NO. 19-35914

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 4:19-cv-05210-RMP
The Honorable Rosanna Malouf Peterson
United States District Court Judge

STATE PLAINTIFFS-APPELLEES' RESPONSE TO MOTION FOR STAY PENDING APPEAL

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I. INTRODUCTION

This case involves the Executive Branch's misuse of a narrow and rarely-used statutory basis for excluding immigrants to achieve a policy goal that it could not enact through Congress. Since 1882, Congress has barred from entry into the United States any person "unable to take care of himself . . . without becoming a public charge," Immigration Act of 1882, 47th Cong., ch. 376, 22 Stat. 214. The United States Department of Homeland Security (DHS) now proposes to remake this provision into—its own words—a "transformative" tool to reshape American immigration policy, by excluding lawfully present immigrants using federal benefits so common that, if applied to U.S.-born individuals, it would reach nearly 40% of the population. But Congress has directly spoken to this precise question and rejected DHS's proposed definition. This expression of congressional intent governs, as five district courts across the country now have ruled, and requires invalidation of the Rule.

DHS also fails to show it will suffer irreparable injury as required to obtain the extraordinary remedy of a stay pending appeal. Its claim of emergency from a flood of public charges into the country is belied by the fact that, from 1892 to the last year in which DHS maintains data, DHS and its predecessors have excluded less than one percent of prospective immigrants on this ground. The

already expedited course of the interlocutory appeal fully addresses DHS's claimed harm from an injunction that merely keeps longstanding procedures in place pending judicial review.

DHS's motion should be denied.

II. BACKGROUND

A. Statutory and Regulatory Background

The Immigration and Nationality Act authorizes the federal government to deny admission or change of status to noncitizens it deems "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4). Historically, the term "public charge" has always had the same meaning: a person unable to care for themselves and primarily dependent on the government for support. *See Gegiow v. Uhl*, 239 U.S. 3 (1915). This ground for exclusion has also been a narrow one—DHS's own data shows that between 1892 and 1980 (the last year DHS reports), less than one percent of immigrants were deemed inadmissible as likely to become public charges. *See* Add.290–91. Further, DHS's predecessor agency issued guidance making clear that an immigrant's use of non-cash benefits such as Medicaid promotes public health generally and is *not* subject to the public charge analysis. 64 Fed. Reg. 28,689 (Mar. 26, 1999) (1999 Field Guidance).

B. The New Rule

On August 12, 2019, as part of its effort to transform national immigration policy, DHS published the rule at issue, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the Rule). The Rule redefines "public charge" as an "alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period." 8 C.F.R. § 212.21(a). Under this "12/36" standard, receipt of two benefits in a given month counts as two months, three benefits as three months, and so forth—regardless of the amounts received. *Id.*

The Rule ended the long-established policy of excluding non-cash benefits from the public-charge assessment. It now requires consideration of (1) cash assistance such as TANF; (2) Supplemental Nutrition Assistance Program (SNAP) benefits; (3) Section 8 housing and rental assistance; (4) Medicaid (with limited exceptions); and (5) Section 9 public housing assistance. 8 C.F.R. § 212.21(b). The Rule creates a new set of positive and negative factors predominantly tied to an immigrant's wealth. *See, e.g.*, 8 C.F.R. § 212.22(b) (mere application for or certification to receive benefits even without actual receipt; annual gross household income under 125% of FPG); (c)(1)(B) (lack of private health insurance). It dramatically expands the scope of the

previously-narrow exclusion: if applied to U.S.-born individuals, it would reach 40% of the population. Add.030.

On October 11, 2019, after reviewing voluminous pleadings, declarations, public comments, and amicus briefs, the district court granted the Plaintiff States' motion for stay under section 705 of the Administrative Procedure Act and for preliminary injunction. More than a month later, DHS seeks an emergency stay.

C. Other Proceedings

Every other district court to consider similar challenges to the Rule—including courts in New York, California, Illinois, and Maryland—also enjoined and stayed its implementation. *See New York v. U.S. Dep't of Homeland Sec.*, No. 19-7777, 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, No. 19-4717, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019); *Casa De Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook County v. McAleenan*, No. 19-6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).

III. ARGUMENT

A. DHS Cannot Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction

Because a stay pending appeal is an "intrusion into the ordinary processes

of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations omitted), the party requesting a stay "bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769 (9th Cir. 2018) (citing *Nken*, 556 U.S. at 433). The Court considers four factors: (1) whether the appellant has made a "strong showing" of likely success on the merits, (2) "whether the [appellant] will be irreparably injured absent a stay," (3) whether a stay "will substantially injure" other parties, and (4) "where the public interest lies." *E. Bay*, 932 F.3d at 770. "[T]he 'mere possibility' of success or irreparable injury is insufficient." *Id.*

The Court's review is "limited and deferential, and it does not extend to the underlying merits of the case." *Johnson v. Courturier*, 572 F.3d 1067, 1078 (9th Cir. 2009). This Court will only reverse the trial court's decision if it was based on "an erroneous legal standard," *id.*, or "resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (citation and internal quotation marks omitted).

B. DHS Cannot Show It Is Likely to Succeed on the Merits

Because the trial court did not base its decision on an erroneous legal standard or clearly erroneous findings of fact, DHS cannot make the required "strong showing" it is likely to succeed on the merits.

1. The States have standing

The trial court found that the Rule will injure the Plaintiff States in three ways: (1) financial harm through predictable disenrollment in state and federal safety net programs by eligible, lawfully present noncitizens; (2) pecuniary harm from contagion due to an increase in unvaccinated residents; and (3) administrative costs incurred as a result of the Rule. Order (Motion, Attach. A) at 22–23. DHS does not demonstrate these determinations were illogical, implausible, or without support in the record. To the contrary, DHS admits these harms will occur; disenrollment in the safety net programs is, in fact, the agency's *desired* result. 84 Fed. Reg. at 41,300–01; *see also* 84 Fed. Reg. at 41,463 ("some individuals may disenroll or forego enrollment in public benefits programs even though they are not directly regulated by this rule"); *see also id.* at 41,469 (agreeing "State and local governments . . . would incur costs related to the changes"); *id*. at 41,384; Add.028–31 (citing declarations).

States plainly have standing to challenge rulemaking that imposes a

financial cost on them. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 521–26 (2007); *California v. Azar*, 911 F.3d 558, 571–73 (9th Cir. 2018).[1]

DHS argues that these harms are not "fairly traceable" to the Rule because they are caused by the independent acts of third parties. But the Supreme Court rejected this argument in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), holding that harms are traceable to government actions where they result from "the predictable effect of [those] actions on the decisions of third parties." *Id*. at 2565–66; *see also California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 421 (9th Cir. 2019). Standing is established where, as here, the States demonstrate, *and DHS concedes*, immigrants will react in a *predictable* way to the Rule, thus causing significant financial harm to the States and the health of their residents.

DHS also cannot make a "strong showing" the Plaintiff States are outside the "zone of interests" protected by section 1182(a)(4). *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). A party fails this test only where

[1] The States also have standing for two additional reasons: (1) the Rule undermines state health care, nutrition, and housing assistance programs (*see* Add.026–28, 030), and (2) the Rule will harm the health and well-being of state residents (Add.027–31). *See Washington v. Trump*, 847 F.3d 1151, 1159–60 (9th Cir. 2017); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Am. Rivers v. FERC*, 201 F.3d 1186, 1205 (9th Cir. 1999).

its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Here, the public charge statute was originally enacted at the behest of states to protect state treasuries. Add.281–82. DHS's interpretation, however, shifts costs for the care of legally present immigrants from the federal to state governments and thus will harm state treasuries. Therefore, the district court was not plainly wrong in finding the States are within the zone of interests.

2. The district court did not clearly err in determining the Rule was contrary to law

a. Under *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). If Congress's intent is clear, "that is the end of the matter." *Chevron*, 467 U.S. at 842–43. Only where "Congress has not directly addressed the precise question at issue," and the statute "is silent or ambiguous with respect to the specific issue," does the court determine "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

In the district court, DHS consistently argued that Congress had clearly spoken to the precise question presented here. Add.223–36. DHS now abandons that position and argues that the Act is ambiguous under step two of *Chevron*, requiring deference to its interpretation of the statute. Motion at 9–12.[2]

DHS waived this argument by failing to present it to the district court. *Honcharov v. Barr*, 924 F.3d 1293, 1295 (9th Cir. 2019) (citation omitted) (waiver doctrine "preserve[s] the integrity of the appellate structure" by requiring that "an issue must be presented to, considered and decided by the trial court before it can be raised on appeal" and "prevent[s] parties from withholding 'secondary, back-up theories' at the trial court level"); *see also Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019). On this basis alone, this Court should deny DHS's stay motion.

b. Even if this Court were to find DHS's arguments are properly presented, it was not clearly erroneous for the district court to rule that DHS's interpretation is unsupported by the text, history, and context of the statute itself. The *Chevron* inquiry begins with the language of the statute. *Bd. of Governors*

[2] DHS's argument below that Congress delegated it authority to interpret section 1182(a)(4) was not a pitch for *Chevron* deference, but instead was to argue that Congress's reenactments of the public charge exclusion did not implicitly adopt previous agency interpretations. *See* Add.236–38. Notably, the word "permissible" does not appear in DHS's briefing below.

of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986). The text of the original 1882 public charge exclusion provided that a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . . shall not be permitted to land." Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

Because the statute does not define "public charge," it must be presumed the 47th Congress intended the term to have its "ordinary or natural meaning" in the "year [it] was enacted." *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).[3] The most natural reading of "public charge" in the 1882 statute refers, as the text says, to one who is "unable to take care of himself or herself." *Id*. Dictionaries from the 1880s similarly defined a "charge" as someone "committed to another's custody, care, concern, or management," again reflecting the statutory text. *See* Add.037–38. The only relevant dictionary definition cited by DHS concurred. Add.224 (citing Stewart Rapalje et al., Dict. of Am. and English Law (1888)) (defining "charge"

[3] In numerous cases, the Supreme Court has applied *Chevron* step one analysis to determine the meaning of undefined statutory terms. *See, e.g.*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586, 600 (2004) (intent as to meaning of "age"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–441, 445 n.29 (1987) (intent as to meaning of "well-founded fear of persecution"); *Brown & Williamson*, 529 U.S. at 156 (intent as to meaning of "drug").

as "a pauper being chargeable to a parish or town.").[4] No contemporaneous dictionary defined a "charge" to include a person receiving even a minimal amount of assistance. Thus, the ordinary meaning of the statutory text does not support DHS's interpretation.

The statutory context confirms Congress's intent that receipt of public benefits did not itself render an immigrant a public charge. The 47th Congress enacted, alongside the public charge provision, a 50-cent head tax to "provide for the support and relief of such immigrants" who "may fall into distress or need public aid." ch. 376 § 2, 22 Stat. 214. This head tax refutes DHS's interpretation that any amount of public aid may render an immigrant a public charge. *Brown & Williamson*, 529 U.S. at 132–33 (in determining whether Congress has "specifically addressed the question at issue" under *Chevron*, a reviewing court must place the provision in "statutory context," interpreting the statute to create "a symmetrical and coherent regulatory scheme" (citation omitted)).

c. Over 100 years of consistent judicial precedent and agency action further confirms that Congress adopted the term's common law meaning. Every

[4] DHS cited one other contemporaneous dictionary, defining the term "charge" in the context of a financial transaction. Add.224 (citing Frederic Jesup Stimson, Glossary of the Common Law (1881) ("as when land is charged with a debt"). That definition is inapposite.

judicial decision since 1882 reflects the interpretation the Plaintiff States advocate—that a "public charge" refers to persons unable to care for themselves, not those who receive any increment of public assistance. *See, e.g.*, *Gegiow*, 239 U.S. at 9–10 (holding that those likely to become public charges "are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions"); *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) ("[w]e are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future"); *Ex parte Mitchell*, 256 F. 229, 233 (N.D.N.Y. 1919); *United States v. Williams*, 175 F. 274, 275 (S.D.N.Y. 1910). DHS cited below *no* federal case supporting its interpretation of the phrase, and the cases it did cite refuted its argument.[5]

The Rule also is irreconcilable with the agency's own pronouncements for

[5] DHS pulled out-of-context case snippets appearing to support its position, but careful review belies this inference. *See United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) ("[I]t is not the practice to require a bond from [an immigrant] merely because he may have but little ready money."); *Lam Fung Yen v. Frick*, 233 F. 393, 39 (6th Cir. 1916) (immigrant found a public charge because he was a habitual gambler likely to be incarcerated; deemed a public charge on this ground); *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (immigrant convicted of smuggling whiskey and was due to be incarcerated; deemed a public charge on this ground); *In re Feinkopf*, 47 F. 447, 447–48 (E.D.N.Y. 1891) (finding immigrant *not* a public charge, despite having come to the country with just 50 cents).

over 70 years. *See, e.g.*, *Public Charge Provisions of Immigration Law: A Brief Historical Background*, USCIS, https://www.uscis.gov/history-and-genealogy/our-history/public-charge-provisions-immigration-law-a-brief-historical-background#_ftnref1 ("[I]mmigrants who showed they had no physical or mental conditions that could prevent them from working and who demonstrated a willingness to work were admitted.").

DHS's account of administrative decisions below relied primarily on a mischaracterization of an excerpt from *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (A.G. 1962). But *Martinez-Lopez* actually confirmed the States' reading. *See id.* (explaining that "the [INA] requires more than a showing of a possibility that the alien will require public support"). Other administrative decisions likewise refuted DHS's current interpretation. *See Matter of B-----*, 3 I. & N. Dec. 323, 324 (B.I.A. 1948) ("acceptance by an alien of services provided by a State . . . does not in and of itself make the alien a public charge [for removal purposes]"); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."); *see generally* Add.107 (*Make the Road New York* Compl., ¶ 70) (citing additional consistent administrative decisions).

When INS issued its Field Guidance in 1999, it confirmed what already was plain—that it had "never been [INS] policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge." 64 Fed. Reg. at 28,692. Thus, the district court rejected DHS's argument that its 1999 Field Guidance was novel or anomalous, as the agency's earlier regulations were also consistent with the guidance. *See Final Rule: Adjustment of Status for Certain Aliens*, 52 Fed. Reg. 16,205, 16,209 (May 1, 1987) (public charge analysis would not extend to the receipt of "assistance in kind, such as food stamps, public housing, or other non-cash benefits . . . or certain types of medical assistance (Medicare, Medicaid, emergency treatment) . . .").

Congress' reenactment in 1952 and again in 1996 of the INA's public charge exclusion "against the backdrop of" over a century of consistent case law and "consistent and repeated statements" by immigration enforcement agencies precludes DHS's novel and unsupported interpretation. *Brown & Williamson*, 529 U.S. at 144; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" (citation omitted)). Indeed, Congress has since rejected

efforts to change the definition of public charge to include those who receive certain in-kind benefits for a period of 12 months. S. Rep. No. 113-40, at 42, 63 (2013).

The history of the public charge exclusion, as interpreted consistently for over 100 years by courts and administrative agencies, demonstrates a plain meaning inconsistent with DHS's statutory interpretation.

d. The context of the public charge exclusion confirms that Congress adopted the term's common law meaning. In the debate leading up to the Immigration Control and Financial Responsibility Act of 1996, in which Congress reenacted the public charge exclusion, Congress considered and rejected an earlier version of the bill that would have defined as a public charge any noncitizen who received means-tested public benefits. Immigration Control and Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996); *see also* H.R. Rep. No. 104-828, at 138 (1996) (Conf. Rep.). The express purpose of this provision was to overturn the settled understanding of "public charge" found in the case law, as DHS now attempts to do. *See* 142 Cong. Rec. S4401, S4408–09 (1996). Although a version of the bill including the expansive definition of public charge cleared one chamber of Congress, the bill could not be passed until the provision was removed. 142 Cong. Rec. S11872, S11882

(1996) (statement of Sen. Kyl); *see* Add.112–13 (*Make the Road* Compl., ¶¶ 80–83 (explaining legislative history)).

The law is clear, however, that an agency may not enact through rulemaking the very policy Congress expressly rejected. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (agency may not adopt an interpretation that Congress had expressly rejected); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) (holding that in light of fact that Congress, in amending 26 U.S.C. § 501(c)(3), had considered and rejected amendments to same effect as statutory interpretation advanced by the plaintiff, Court could infer Congress's intent from its failure to act); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (after conference committee rejected one house's bill and enacted statute without it, agency could not adopt interpretation mirroring rejected bill).

While DHS argues that failed legislative proposals are "dangerous grounds" on which to interpret a "prior statute," the States do not ask the Court to infer one Congress's intent from the *inaction* of *another* Congress. Rather it is Congress's *explicit rejection* of the very interpretation the Rule seeks to enact

in the specific statute at issue that forecloses DHS's efforts here.[6]

e. Even if this Court were to find *Chevron* deference appropriate, the district court was well within its discretion in concluding DHS's interpretation is likely unreasonable. In applying *Chevron* deference, courts will look to dictionary definitions and "contextual indications" for a term's meaning, and will reject an agency's interpretation "when it goes beyond the meaning that the statute can bear." *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 226, 229 (1994). "[T]he presence of some uncertainty" in the meaning of a statutory term "does not expand *Chevron* deference to cover virtually any interpretation." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009). Because Congress has considered and rejected DHS's assertion that receipt of even a small amount of public benefits would justify a public charge designation, the Rule constitutes an impermissible interpretation.

Further, the fundamental premise of DHS's plea for deference—that the Rule is intended to promote Congress's stated goal of "self-sufficiency" (Motion at 11)—is without merit. First, DHS has no basis for attempting to construe 8 U.S.C. § 1601, since Congress did not delegate it authority to interpret a statute

[6] This distinguishes this case from *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). See *id*. at 169–70 and n.5.

designed to address U.S. social welfare policy. *See E.E.O.C. v Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). Second, DHS has no expertise in welfare reform or whether public benefits programs lead to self-sufficiency, and because the Rule contradicts the agency's earlier position, DHS's interpretation is not entitled to even minimal deference. *Id*. Third, DHS may not use a statement of policy in a different statute to interpret the INA, because that "would virtually free [DHS] from its congressional tether." *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010); *see also id*. at 654 (noting that policy statements are "not delegations of regulatory authority"). In short, DHS has no authority to interpret section 1182(a)(4) based on a policy statement in a statute it is not charged with administering.

DHS's citation to other statutory provisions regarding consideration of benefits is unavailing. Motion at 9–10. The first provision it cites creates a carve-out for otherwise "non-qualified" aliens in the U.S. who have been subject to extreme cruelty by a household member. 8 U.S.C. § 1641(c). They qualify for an array of federal and state benefits. *See* 8 U.S.C. §§ 1611(c), 1612(b)(1), 1613(a). The fact that Congress further extended protection to this group from designation as public charges, 8 U.S.C. § 1182(s), does not suggest that it intended to authorize DHS to deem all other benefits recipients public charges.

DHS cites another provision that actually undermines its position, the requirement that sponsors of certain immigrants repay any government body for public benefits they receive. 8 U.S.C. § 1183a(b)(1). This provision only further underscores Congress's intent that aliens *could* receive means-tested benefits without becoming public charges.

3. The district court did not clearly err in finding the Rule arbitrary and capricious

An agency must articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43. Further, where an agency departs from its prior guidance that engendered serious reliance interests, it must provide an even more "detailed justification" for its actions. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). What DHS now describes as "reasoned decisionmaking" falls far short of that mark.

Rather than meaningfully address the vast majority of comments opposing the Rule, DHS repeatedly invoked its purported goal of promoting

"self-sufficiency" to justify the devastating effects the Rule is likely to have on public health. *See* Order at 52. For example, DHS received comments from many national medical associations cautioning the Rule would jeopardize public health by effectively forcing noncitizens to disenroll from Medicaid, thereby decreasing access to vaccinations and increasing the risk of deadly outbreaks of communicable diseases. *Id.* These warnings echoed the agency's own prior guidance that noncitizens' reluctance to use public health benefits had "an adverse impact not just on the potential recipients, but on public health and the general welfare." 64 Fed. Reg. at 28,692–93. The Rule is thus not merely a departure from the agency's prior guidance but a direct contradiction of it. *See id.* (noting that "non-cash benefits are . . . not evidence of poverty or dependence" and should not be considered in the public charge analysis); *see also Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) ("Divergent factual findings with respect to seemingly comparable [circumstances] raise questions as to whether the agency is fulfilling its statutory mandate impartially and competently.").

DHS's response to these public health concerns was cursory: First, the agency exempted children's and pregnant women's receipt of Medicaid benefits, theorizing—without supporting evidence or analysis—that such exemptions

"should address a substantial portion, though not all, of the vaccinations issue." 84 Fed. Reg. at 41,384. Second, in apparent recognition that unvaccinated adults may still suffer from and transmit diseases, DHS speculated that various state and local health organizations *might* mitigate such harm by providing "preventive services [including] vaccines that *may* be offered on a sliding scale fee based on income." 84 Fed. Reg. at 41,385 (emphasis added).

DHS's speculation on both counts was refuted by commenters and declarations from state and local health officials in support of the Plaintiff States' motion. Order at 16–17; Add.295–96. Furthermore, although DHS ultimately conceded the Rule *would* result in disenrollment, reduced coverage, and related public health harms, it nevertheless moved forward, claiming the full scope of such harm was uncertain and difficult to ascertain. 84 Fed. Reg. at 41,312, 41,384. This is a hallmark of arbitrary rulemaking. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018) (agency "must explain why uncertainty justified its conclusion, otherwise, we might as well be deferring to a coin flip" (citation omitted)). DHS is neither entrusted with nor experienced in overseeing health policy, and its willingness to gamble with public health renders the Rule arbitrary and capricious. *See McDonnell Douglass Corp. v. U.S. Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (courts will not defer

to an agency's "conclusory or unsupported suppositions").

The arbitrary nature of the Rule is further underscored by DHS's disregard for comments warning of its catastrophic harms on children. *See* Order at 51–52. Although commenters alerted DHS the Rule would lead to increased childhood hunger, malnutrition, and homelessness (for citizen and noncitizen children alike), DHS again concluded simply that such harms were justified in the interest of "self-sufficiency." *Id.*; 84 Fed. Reg. at 41,314. DHS even theorizes—without citing *any* evidence—the Rule might actually improve public health. 84 Fed. Reg. at 41,314. DHS may not, however, rely on such ideological and unsupported conjecture as evidence of "reasoned decisionmaking." *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."); *Am. Wild Horse Preservation v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating agency action for failure "to consider or to adequately analyze [the] consequences" of its decision).

For all these reasons, the district court was not plainly wrong in concluding the Rule is likely arbitrary and capricious.[7]

[7] For the reasons set forth in its order, the district court also did not abuse its discretion in concluding the Rule likely violates the Rehabilitation Act—a

C. DHS Will Suffer No Irreparable Harm Pending Appeal, but Staying the Injunction Would Irreparably Harm the Plaintiff States

DHS cannot show its "claimed irreparable injury [is] likely to occur," and "simply showing some 'possibility of irreparable injury' is insufficient." *E. Bay*, 909 F.3d at 1254. In its preliminary injunction opposition, DHS submitted nothing suggesting the federal government would be irreparably harmed by delaying implementation pending adjudication on the merits, let alone during the few months necessary for resolution of its interlocutory appeal. DHS now claims it will be irreparably harmed absent a stay because it cannot enforce the Rule, and because some unspecified number of individuals who might qualify as public charges under the Rule could in the interim obtain adjustments of status under the longstanding framework historically governing such determinations. This argument cannot survive scrutiny.

First, DHS's argument is fatally overbroad: its cursory argument that it is per se harmed from being enjoined against enforcing a new agency rule would apply equally to *any* case in which government conduct were enjoined. Second, DHS's argument presumes it has been irreparably injured for over 100 years, during which time the still prevailing public charge standard applied, yet it offers

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point the Plaintiff States will address more fully in their appeal briefing. *See* Order at 45–47.

no evidence to support this conclusion. Third, DHS exaggerates the effect of the injunction. DHS's own historical data show that the public charge exclusion has never played a significant role in immigration. Add.290–91. In contrast, in just 8 of the 14 Plaintiff States, over 1.8 million lawfully present residents may be driven from federal and state assistance programs if the injunction is lifted. Add.025–26. Whatever the number of excludable individuals who will remain in the country during the few months before resolution of DHS's appeal, it pales in comparison to the potential irreparable harm documented by the States.

DHS did not attempt to rebut the Plaintiff States' 50 declarations detailing the harms they will suffer if the Final Rule goes into effect, including loss of health care services, food insecurity, and homelessness for resident families and children. *See* Add.024–31. These harms to public health and the related unrecoverable financial and other losses to the Plaintiff States are clear, irreparable injuries under this Court's precedent.

D. The Injunction's Scope Is Proper

"[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *E. Bay*, 909 F.3d at 1255 (citation omitted). Here, universal relief is necessary to afford the Plaintiff States effective relief. *See id.*; *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th

Cir. 1987). The disenrollment and resulting harms to health and well-being of resident families and children caused by the Rule and its chilling effect can be sufficiently addressed only with a nationwide remedy.

First, any immigrant residing in one of the Plaintiff States who in the future may wish to move to a non-plaintiff state would be deterred from accessing public benefits if relief were limited in geographic scope. Second, a geographically limited injunction could spur immigrants now living in non-plaintiff states to move to one of the Plaintiff States, compounding their economic injuries. Third, a public health crisis or outbreak resulting from the Rule's implementation in another state may quickly spread to the Plaintiff States. Finally, with any non-universal injunction, a lawful permanent resident returning from a trip abroad of more than 180 days would be subject to DHS's new Rule at a point of entry. In sum, DHS's proposal of a 14-state injunction is unworkable and would not provide complete relief. Such "a fragmented immigration policy would run afoul of" the need for "uniform immigration law and policy." *Washington*, 847 F.3d at 1166–67.

IV. CONCLUSION

This Court should deny DHS's motion to stay the preliminary injunction pending appeal.

RESPECTFULLY SUBMITTED this 22nd day of November, 2019.

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STATEMENT OF RELATED CASES

The following related cases are pending before this Court: *City & County of San Francisco, et al. v. U.S. Citizenship & Immigration Servs., et al.*, No. 19-17213 and *State of California, et al. v. U.S. Dep't of Homeland Sec., et al.*, No. 19-17214.

Plaintiffs-Appellees are not aware of any other related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5,594 words. This Response complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14-point font.

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ADDENDUM

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	NO. 4:19-cv-05210-RMP PLAINTIFF STATES' MOTION FOR § 705 STAY PENDING JUDICIAL REVIEW OR FOR PRELIMINARY INJUNCTION NOTED FOR: OCTOBER 3, 2019 With Oral Argument at 10:00 a.m.

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I. INTRODUCTION

On August 14, 2019, Defendants (collectively, DHS) issued a Final Rule that will cause hundreds of thousands of families in the Plaintiff States, and millions of eligible children and adults nationwide, to disenroll from federal and state health care, nutrition, and housing benefits programs. This, in turn, will result in State residents losing hundreds of millions of dollars in health care services, decreased vaccinations and increased transmission of communicable diseases, and denied access for people with disabilities to services only available through Medicaid. It will increase hunger, malnutrition, and homelessness among children, all associated with deficits in cognitive development, chronic asthma, substance abuse, depression, and behavioral challenges. As demonstrated by the 51 declarations submitted with this motion, DHS's Rule will undermine the mission of dozens of state programs and impose millions of dollars in costs to the Plaintiff States to address the resulting public health problems, educational burdens, and homelessness.

The Plaintiff States move to stay the Rule pending judicial review under the Administrative Procedure Act, or alternatively for a preliminary injunction prohibiting DHS from implementing the Rule, which is scheduled to take effect on October 15, 2019. Through the Rule, the Administration attempts to remake the "public charge" doctrine, a rarely used statutory ground for exclusion of immigrants, into—in its own words—a "transformative" tool to reshape

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American immigration policy. The Plaintiff States are likely to succeed on the merits of their claims for a host of reasons:

First, DHS interprets the term "public charge" in a manner contrary to Congress's intent, as evidenced by statutory text, history, and context.

Second, DHS brazenly adopts a legal standard that Congress twice expressly rejected, "coopt[ing] Congress's power to legislate" through executive action. *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018).

Third, the Rule separately violates four statutes: (1) the Immigration and Nationality Act of 1952, (2) the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (3) the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and (4) the Rehabilitation Act of 1973.

Fourth, the Rule is arbitrary and capricious because DHS failed to meaningfully address evidence of the harm the Rule inflicts on vulnerable people, especially children, the elderly, and individuals with disabilities, and DHS ignored its own evidence that the factors it prescribed for the public charge analysis are arbitrary, ill-defined, and give unreasonable discretion to immigration officials.

DHS's unlawful efforts to refashion American immigration policy through regulation should not take effect while the Plaintiff States' legal challenge is pending.

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II. BACKGROUND

A. Overview of Public Charge Ground of Inadmissibility

The Immigration and Nationality Act (INA) requires certain immigrants to prove that they are "not inadmissible." 8 U.S.C. § 1361; 8 U.S.C. § 1225(a). A noncitizen who is "likely at any time to become a public charge" is inadmissible. 8 U.S.C. § 1182(a)(4).[1] This "public charge exclusion" is enforced abroad by consular officers (who process visa applications) and domestically by Defendant USCIS. It applies to:

- noncitizens seeking to become lawful permanent residents;
- immigrants entering the United States on a visa;[2]
- noncitizens applying to "adjust" status to lawful permanent residency (*i.e.*, apply for a green card); and
- permanent residents "seeking admission" (including, among other circumstances, when a permanent resident returns to the United States after a trip of more than 180 days).

8 U.S.C. §§ 1101(a)(13)(c), 1182(a), 1225(a), 1255(a), 1361.

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[1] Certain groups of noncitizens, such as asylum seekers and refugees, are exempt from the public charge ground. *See* 8 U.S.C. §§ 1157(c)(3), 1158(b)(2), 1159(c).

[2] Visa holders undergo an inadmissibility determination by DHS at ports of entry every time they enter and re-enter the United States. 8 U.S.C. § 1185(d).

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B. History of the Public Charge Exclusion

From colonial "poor laws" through modern times, the term "public charge" has had a clear and established meaning: a person unable to care for himself or herself and primarily dependent on the state for support. *See* Minor Myers III, *A Redistributive Role for Local Government*, 36 Urb. Law. 753, 773 (2004) (colonial poor laws permitted towns to expel transient beggars, vagrants, and paupers as "public charges"); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1846 (1993); Hidetaki Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (2017) (mass European migration in the early 19th century brought "large numbers of exceptionally impoverished and destitute people" who were described, in common parlance and law, as "public charges," "paupers," or both); Immigration Act of 1882, 47th Cong., ch. 376, 22 Stat. 214 (1882) (borrowing from state immigration laws, to prohibit the landing in the United States of "any convict, lunatic, idiot, or any other person unable to take care of himself . . . without becoming a public charge"); 26 Stat. 1084, 1084 (1891) (adding "paupers" to the list so that the provision precluded admission of "idiots, insane persons, paupers or persons likely to become a public charge").

When Congress reorganized immigration law into the present statutory framework, the INA retained the long-established exclusions of "paupers" and those "likely at any time to become a public charge," along with numerous other

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grounds of inadmissibility—including for those with "a mental defect," "physical defect," disease," or "disability . . . of such a nature that it may affect the ability of the alien to earn a living." Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 414, § 212(a), 66 Stat. 163, 182 (codified as amended at 8 U.S.C. § 1101, *et seq*.).[3]

C. DHS's Public Charge Rule

On August 12, 2019, DHS issued a Final Rule designed to "transform"[4] who may immigrate to the United States, by expanding the previously rarely used "public charge" exclusion.[5] Final Rule, *Inadmissibility on Public Charge*

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[3] The Immigration Act of 1990 eliminated all of the above grounds of inadmissibility, with the exception of the public charge exclusion. Pub. L. No. 101-649, § 601(a)(4), 104 Stat. 4978, 5072 (codified as amended at 8 U.S.C. § 1182).

[4] *See* Eileen Sullivan & Michael D. Shear, *Trump Sees an Obstacle to Getting His Way on Immigration: His Own Officials*, N.Y. Times (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/us/politics/trump-immigration-stephen-miller.html?action=click&module=Top%20Stories&pgtype=Homepage.

[5] Between 2000 and 2016, less than 0.2% of the more than 17 million immigrants admitted as lawful permanent residents were denied visas on public charge grounds. *See* Report of the Visa Office, 2000–2018, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html.

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Grounds, 84 Fed. Reg. at 41,292 (August 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248) (the Rule).[6] The Rule becomes effective October 15, 2019. 84 Fed. Reg. at 41,292.

The Rule unmoors the public charge definition from its historic anchor in primary dependence on the government for subsistence, and it significantly expands the types of benefits considered in the public charge determination and the amount of wealth an immigrant needs to remain in the country. In public comments, many states (including the Plaintiff States) explained the devastating impacts the proposed rule would have on the health care costs and well-being of families of legal immigrants in their states. *See, e.g.*, Bays Decl.[7] Exs. H, I.

1. New definition of "public charge"

Contrary to the established meaning of "public charge" and Congressional intent, the Rule redefines the term as "an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period." 8 C.F.R. § 212.21(a). Under the 12-month threshold, receipt of two

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[6] Unless otherwise noted, all subsequent C.F.R. citations are to provisions of the Rule to be codified and effective October 15, 2019.

[7] Plaintiff States refer throughout to declarations submitted with this Motion by the last name of the declarant, followed by the pertinent reference to the paragraph or exhibit number of that declaration.

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benefits in a given month counts as two months, three benefits as three months, and so forth—regardless of the amounts received. 8 C.F.R. § 212.21(a).

2. Consideration of non-cash benefits

The Rule dismisses the longstanding interpretation of the benefits that trigger a public charge determination and casts a vastly wider net to include common, non-cash federal benefits.[8] A "public benefit" includes: "(1) [a]ny Federal state, local or tribal cash assistance for income maintenance," including SSI, TANF, or state "General Assistance"; (2) Supplemental Nutrition Assistance Program (SNAP); (3) Section 8 housing assistance vouchers; (4) Section 8 project-based rental assistance; (5) Medicaid (with exceptions for benefits or services for emergency medical conditions, under the Individuals with Disabilities Education Act, that are school-based, to immigrants who are under 21 years of age or a woman during pregnancy); and (6) public housing under Section 9 of the U.S. Housing Act of 1937. 8 C.F.R. § 212.21(b).

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[8] Between 2009 and 2012, approximately 52.2 million people in the United States (or 21.3% of the general population) participated in one or more major public assistance programs in a given month—including the programs swept up in the Rule—of whom more than two-thirds participated for at least 12 months. *See* Shelley K. Irving & Tracy A. Loveless, *Dynamics of Economic Well-Being*, U.S. Census Bureau at 2–4 (May 2015).

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3. "Heavily weighted factors" and other wealth-related criteria

The Rule creates new heavily weighted factors in determining whether a noncitizen is a public charge, placing heavily negative weight on poverty. The Rule establishes four factors having heavily negative weight:

1. the immigrant is not a full-time student and is authorized to work, but is unable to demonstrate current or recent employment, or no reasonable prospect of future employment;

2. the immigrant has received or has been certified or approved to receive one or more public benefits for more than 12 months in the aggregate within any 36-month period;

3. (A) the immigrant has been diagnosed with a medical condition that likely will require extensive medical treatment or will interfere with his or her ability to attend work or school; and (B) he or she is uninsured and has no prospect of obtaining private health insurance nor the financial resources to pay for reasonably foreseeable medical costs;

4. the immigrant has been previously found to be inadmissible or deportable on public charge grounds.

8 C.F.R. § 212.22(c)(1)(i)–(iv).

Other wealth-related criteria the Rule introduces include whether the immigrant (1) is under the age of 18 or over the minimum early retirement age for social security; (2) has a medical condition that will require extensive treatment or interfere with the ability to attend school or work; (3) has an annual household gross income under 125% of the Federal poverty guidelines (FPG); (4) has a household size that makes the immigrant likely to become a public charge at any time in the future; (5) lacks significant assets, like savings accounts,

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stocks, bonds, or real estate; (6) lacks sufficient assets and resources to cover reasonably foreseeable medical costs; (7) has any financial liabilities; (8) has applied for, been certified to receive, or received public benefits after October 15, 2019; (9) has applied for or has received a USCIS fee waiver for an immigration benefit request; (10) has a lower credit history and credit score; (11) lacks private health insurance or other resources to cover reasonably foreseeable medical costs; (12) lacks a high school diploma (or equivalent) or a higher education degree; or (13) is not proficient in English. 8 C.F.R. § 212.22(b).

Heavily weighted positive factors also evaluate wealth and include whether (1) the immigrant's household income, assets, or resources are at least 250% of the FPG; (2) the immigrant legally works with an annual income at least 250% of the FPG; and (3) the immigrant has private health insurance, except for any health insurance for which there are tax credits under the Affordable Care Act. 8 C.F.R. § 212.22(c)(2)(i)-(iii).

4. Changes in bond requirements

If DHS determines a noncitizen likely to become a public charge, it nevertheless may allow the person to obtain a visa by submitting a public charge bond. 8 U.S.C. § 1183. The Rule increases the bond amount more than eight-fold, to $8,100. 8 C.F.R. § 213.1(c)(2). The Rule also severely limits the use of bonds, which "generally will not" be allowed if an immigrant "has one or more heavily weighted negative factors." 84 Fed. Reg. at 41,451.

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5. Failure to address costs to states

Despite the Rule's impact on states' health care plans, housing programs, and supplemental nutrition programs, DHS submitted no federalism summary impact statement and asserted that the Rule "does not have substantial effects on the States." 84 Fed. Reg. at 41,481; *see also id.* at 41,469–70 (dismissing the costs to state and local government as "unclear" and "indirect").

D. The Plaintiff States Will Suffer Immediate and Irreparable Harm

1. The Rule will chill State residents from participating in state and federal benefit programs

If the Rule goes into effect, millions of legally present noncitizens nationwide could be subject to public charge determinations. Bays Decl. Ex. A; 84 Fed. Reg. at 41,417 (admitting that more working immigrants with incomes below the 125% threshold will be determined a public charge); *see also* Bays Decl. Ex. B (in 2017, approximately 380,000 individuals adjusted their immigration status in a manner that likely would have subjected them to a public charge determination under the Rule). Currently, over 6.3 million noncitizens nationwide accept public benefits as defined by the Rule making them subject to a public charge determination, including 233,000 individuals in Illinois, 192,000 individuals in Massachusetts, 188,000 individuals in New Jersey, 92,000 individuals in Maryland, 78,000 individuals in Michigan, and 75,000 individuals in Washington. Bays Decl. Ex. G.

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DHS concedes that the Rule will have a chilling effect on immigrants' willingness to seek public benefits for which they are entitled. 84 Fed. Reg. at 41,312. Immigrants fearing deportation will disenroll from state and federal public benefit programs to avoid the potential classification as a public charge. *See* 84 Fed. Reg. at 41,463 (estimating a 2.5% disenrollment rate from programs included in the new public charge test); *id.* at 51,266–69 (agreeing that the Rule will cause hundreds of thousands of eligible individuals who are members of households with foreign-born noncitizens to disenroll from or forego enrollment in benefits for which they eligible).

In reality, the number of noncitizens who will be chilled from using state or federal public benefits is much higher than DHS's estimates and is expected to range between 15% and 35% among noncitizens. Bays Decl. Exs. C, D, E (reflecting up to 60% disenrollment, even for noncitizens who were exempted from restrictions on access to those benefits); Wong Decl. ¶¶ 27–29, 32–34 (studies in related areas of immigration show that, when threatened with deportation, statistically significant numbers of immigrants will disenroll or not participate in benefit programs related to health, food, and housing). Nationwide, there are over 10.3 million noncitizens in families receiving at least one cash or noncash benefit whom the Rule may cause to disenroll in the applicable program, including 424,000 individuals in Illinois, 335,000 individuals in New Jersey, 255,000 individuals in Massachusetts, 245,000 individuals in Washington,

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182,000 individuals in Maryland, 148,000 individuals in Virginia, 116,000 individuals in Michigan, and 114,000 individuals in Nevada. Bays Decl. Ex. G.

2. Anticipated disenrollment will cause concrete irreparable harm to the Plaintiff States

Nearly all of the benefits programs identified in the Rule are administered by the Plaintiff States, who provide additional funding to many of these programs. *See, e.g.*, Linke Decl. ¶ 8; Sharfstein Decl. ¶ 10; Emerson Decl. ¶ 10. The Plaintiff States also have adopted their own programs to provide additional health care, nutrition, and housing benefits. The Rule causes three types of irreparable injury to the Plaintiff States in connection with these expenditures: (1) harm to missions of state benefits programs; (2) harm to the health and well-being of state residents; and (3) financial harm to the Plaintiff States.

a. Health care

The Plaintiff States combine billions of dollars of federal funds from Medicaid with billions of dollars of state funds to administer health care programs for millions of people in their states. Linke Decl. ¶ 8; Sharfstein Decl. ¶ 10; Emerson Decl. ¶ 10; Neira Decl. ¶ 7. The predicted disenrollment from Medicaid and other state health care programs will undermine the purpose of these programs and frustrate the will of the Plaintiff States' legislatures that enacted them. Linke Decl. ¶¶ 22–25; Sharfstein Decl. ¶¶ 14–16; Betts Decl. ¶ 14; Ezike Decl. ¶ 14; MacEwan Decl. ¶ 7; Persichilli Decl. ¶ 11.

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The Plaintiff States expect millions of people receiving Medicaid coverage to disenroll because of the Rule. Linke Decl. ¶¶ 17–18; Boyle Decl. ¶ 29; Kelly Decl. ¶ 15; Eagleson Decl. ¶ 10; Whitley Decl. ¶ 12; *see* Bays Decl. Ex. C. Millions of families will also be impacted where a member of the household falls under the policy. Linke Decl. ¶ 18; Kelly Decl. ¶ 15; Curtatone & Skipper Decl. ¶ 12; Chavez Decl. ¶ 11; Winders Decl. ¶ 12; *see* Bays Decl. Ex. C. Nationwide, over 9.5 million noncitizens are in in families receiving Medicaid or CHIP benefits. Bays Decl. Ex. G. The effects will be particularly harsh on the Plaintiff States' programs for women, infants, and children, for which participation rates have already decreased since the Rule was first made public. Polk Decl. ¶ 19; Sharfstein Decl. ¶ 16; Hanulcik Decl. ¶¶ 7, 11–20; Bohanan Decl. ¶¶ 13, 19, 22; Kelly, Decl. ¶ 13; Zimmerman Decl. ¶ 13; Neira Decl. ¶ 9. The result will be an annual reduction in medical and behavioral care received by residents of the Plaintiff States. Pryor Decl. ¶ 9; Sharfstein Decl., ¶ 15; Boyle Decl. ¶ 30; MacEwan Decl. ¶¶ 10–13; Berge Decl. ¶¶ 14–17; Groff Decl. ¶¶ 16–17; Clark Decl. ¶¶ 8–9; Batayola Decl. ¶ 23; Basta Decl. ¶ 8; Twite Decl. ¶¶ 11–12. The financial value of foregone health care currently received by residents of the Plaintiff States is projected in the hundreds of millions of dollars. Bays Decl. Ex. I at 2. The loss of medical care and health care insurance will seriously impact the health and well-being of residents of the Plaintiff States. Sharfstein Decl. ¶ 23; Hanulcik Decl. ¶ 19; Batayola Decl. ¶ 14; Hotrum-Lopez Decl. ¶ 6 at 8.

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It will deter eligible individuals from accessing routine preventative medical care like vaccinations. Polk Decl. ¶ 13; Sharfstein Decl. ¶¶ 17–18; Kelly Decl. ¶ 17; Persichilli Decl. ¶¶ 20–22.

As DHS admits, Plaintiff States will suffer higher and more frequent emergency services and uncompensated care costs. 84 Fed. Reg. at 41,384; Sharfstein Decl. ¶ 19; Persichilli Decl. ¶¶ 7–11. Not only will individuals' health suffer, but treatment will be significantly more expensive than if people received care before emergencies materialized; these costs will be borne by the Plaintiff States and private institutions located in the Plaintiff States. Hou Decl. ¶ 22; Sharfstein Decl. ¶¶ 19–22; Fehrenbach Decl. ¶ 36; Emerson Decl. ¶ 16. The Rule thus shifts the costs to the States to pay for the public health problems it creates.

b. Food assistance

The Plaintiff States and local governments manage and administer food assistance programs using federal funds that will be undermined by the Rule. Peterson Decl. ¶¶ 3, 4, 7, 8; Storen Decl. ¶ 5. While the Rule considers only SNAP-related benefits as "public benefits" under the public charge test, the broad chilling effect will harm state-only food assistance programs, too. Predicted disenrollment of tens of thousands of eligible residents from the state supplemental nutrition programs and SNAP benefits will undermine the purpose of these programs and frustrate the will of the legislatures of the Plaintiff States that enacted these programs. Sharfstein Decl. ¶ 23; Hou Decl. ¶ 27;

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Perry Decl. ¶ 17; Peterson Decl. ¶¶ 10, 15; Neira Decl. ¶ 12. The impacts will lead to more vulnerable people experiencing food insecurity and severe public health concerns. Storen Decl. ¶ 9; Fehrenbach Decl. ¶ 33; Curtatone & Skipper Decl. ¶¶ 12–13; Neira Decl. ¶ 18; Sternberg Decl. ¶ 6. The Rule thus not only undermines the Plaintiff States' interest in healthy, stable, and productive residents, but also contradicts the purported goal of the Rule itself to "better ensure" that immigrants "are self-sufficient, i.e., do not depend on public resources to meet their needs." 84 Fed. Reg. at 41,295.

The chilling and disenrollment will particularly hurt children, who as a result of malnutrition and hunger are more likely to suffer deficits in cognitive development, behavioral problems, and poor health. Polk Decl. ¶ 19; Medrano Decl. ¶ 13; Oliver Decl. ¶ 22; Bayatola Decl. ¶¶ 13–14; Hawkins Decl. ¶ 34. Children will have more difficulty in school and require greater resources from the Plaintiff States' educational systems. Polk Decl. ¶ 22; Bohanan Decl. ¶14; Tahiliani Decl. ¶ 7. The Plaintiff States will bear the brunt of higher health care and other costs resulting from the unnecessary malnutrition.

The Rule will reduce combined food and cash assistance to families by tens of millions of dollars. *E.g.*, Hou Decl. ¶ 21. With reduced assistance, grocers will see lower sales, and farmers may see lower prices with decreased demand. Hanulcik Decl. ¶ 13. The Plaintiff States will also bear the public health costs as more individuals suffer from malnutrition and hunger, and ultimately, a less

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productive workforce. Hou Decl. ¶ 23; Peterson Decl. ¶ 13; Hundley Decl. ¶ 15; Fitzgerald Decl. ¶ 16.

c. Housing assistance

The Rule will undermine the efficacy of housing assistance programs. The Rule will undercut the Plaintiff States' programs aimed at housing assistance and homelessness prevention. Ohle Decl. ¶¶ 8, 11; Rubin Decl. ¶¶ 9, 15–19; Curtatone & Skipper Decl. ¶ 10; Baumtrog Decl. ¶¶ 5, 7–8; RI-Doe Decl. ¶¶ 19–21; Carey Decl. ¶ 11; Johnston Decl. ¶ 7; Grossman Decl. ¶ 9; Fitzgerald Decl. ¶ 10; Persichilli Decl. ¶ 30. This will harm the Plaintiff States' abilities to fight homelessness.

The Rule will lead to increased homeless individuals and families in the Plaintiff States, and poorer health, educational, and other outcomes for vulnerable children residing in the Plaintiff States and who, because of their or a family member's immigration status, will be deprived of emergency shelter or placement in permanent housing. Fitzgerald Decl. ¶12; Ohle Decl. ¶ 14; Baumtrog Decl. ¶ 12; Carey Decl. ¶ 12; Johnston Decl. ¶¶ 11, 14; Grossman Decl. ¶¶ 15–16; Rubin Decl. ¶¶ 11, 25, 30. In the first few years after moving to the United States, many immigrants benefit from temporary assistance to adjust to rental housing markets. *See* Bays Decl., Ex. S at 20–22 (noting that the Rule "ignores the fact that public programs are often used as work supports which empower future self-sufficiency"); Grossman Decl. ¶¶ 9, 11–12. Without these

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temporary benefits, immigrant workers employed in low wage fields will be unable to afford current market-based rents. Rubin Decl. ¶¶ 28, 31; Baumtrog Decl. ¶ 12; Carey Decl. ¶ 12; Grossman Decl. ¶¶ 9–10, 16. For instance, demand for long term services and support workers, in which the labor force includes a disproportionate number of immigrants, is expected to grow because of an aging population. Moss Decl. ¶¶ 9–16. Children who have lost their homes will suffer worse educational outcomes and access fewer and less profitable work opportunities. Bourque Decl. ¶ 7; Curtatone & Skipper Decl. ¶ 15; Korte Decl. ¶ 23; Rubin Decl. ¶¶ 37–38.

This homelessness and housing insecurity will irreparably harm the families, children, and the Plaintiff States, which will ultimately bear responsibility for the increased costs and consequences of the Rule. Ohle Decl. ¶ 13; Bourque Decl. ¶¶ 8–9; Curtatone & Skipper Decl. ¶ 16; Baumtrog Decl. ¶¶ 13–14; RI-Doe Decl. ¶ 43; Carey Decl. ¶ 13; Johnston Decl. ¶¶ 13–15; Rubin Decl. ¶¶ 35–36. The Plaintiff States will bear the economic costs of the resulting homelessness of families, including public health and safety costs. Bourque Decl. ¶ 8; Curtatone & Skipper Decl. ¶¶ 15–16; Baumtrog Decl. ¶¶ 13–15; Johnston Decl. ¶¶ 13–15; Rubin Decl. ¶¶ 12, 42–48; Fitzgerald Decl. ¶ 20.

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III. ARGUMENT

A. Legal Standards

1. Administrative Procedure Act § 705 stay standards

The Administrative Procedure Act (APA) authorizes this Court to stay the effective date of the Rule pending judicial review. 5 U.S.C. § 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."); *see also Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016); *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621, 624 (9th Cir. 1979); *Louisiana Real Estate Appraisers Bd. v. United States Fed. Trade Comm'n*, No. 19-CV-214-BAJ-RLB, 2019 WL 3412162, at *2 (M.D. La. July 29, 2019).

The purpose of Section 705 is to allow courts "to maintain the status quo . . . . The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy." *Bauer v. DeVos*, 325 F. Supp. 3d 74, 105 (D.D.C. 2018) (quoting APA, Pub. L. 1944–46, S. Doc. No. 248, at 277 (1946)); *id.* at 106–07; *see also Attorney General's Manual on the Administrative Procedure Act* 105 (1947) ("The function of such a power is, as heretofore, to make judicial review effective"), https://ia600406.us.archive.org/30/items/AttorneyGeneralsManual

OnTheAdministrativeProcedureActOf1947/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947.pdf.[9]

The same traditional equitable factors governing a motion for a preliminary injunction apply to an application for a Section 705 stay: (1) likelihood of success on the merits; (2) irreparable injury; (3) the balance of equities; and (4) the public interest. *See Texas*, 829 F.3d at 424, 435; *Humane Soc'y of United States v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009); *Schwartz v. Covington*, 341 F.2d 537, 538 (9th Cir. 1965); *Assoc. Sec. Corp. v. SEC*, 283 F.2d 773, 774–75 (10th Cir. 1960); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam); *see also Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990) ("The standard is the same whether a preliminary injunction against agency action . . . or a stay of that action is being sought . . .").

Courts sometimes treat preliminary injunctions under Rule 65 and stays under Section 705 as interchangeable. *See Colorado Coal. for Homeless v. Gen Servs. Admin.*, No. 18-CV-1008-WJM-KLM, 2018 WL 3109087, at *1 (D. Colo.

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[9] "The Supreme Court accords deference to the interpretations of APA provisions contained in the *Attorney General's Manual*, both because it was issued contemporaneously with the passage of the APA and because of the significant role played by the Justice Department in drafting the APA." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012 n.7 (9th Cir. 1987).

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2018) ("The Coalition explicitly moves for a preliminary injunction under Federal Rule of Civil Procedure 65. Because this case seeks review of agency action under the APA, the proper authority for preliminary relief is 5 U.S.C. § 705: the public interest."); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1119 n.20 (N.D. Cal. 2018).

2. Preliminary injunction standards

"A party can obtain a preliminary injunction by showing that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in [its] favor, and (4) an injunction is in the public interest." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (quotations and citations omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Under the Ninth Circuit's "sliding scale" approach, these elements are "balanced, so that a stronger showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quotations and citations omitted).[10]

B. The Plaintiff States Are Likely to Succeed on Their APA Claims

The Plaintiff States are likely to prevail on three of their core claims. First, the Rule's expansive new definition of "public charge"—on which the entirety

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[10] The "sliding scale" approach has been criticized as inconsistent with *Winter*. *See Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

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of the Rule is premised—deviates from the plain meaning of the statutory term, and therefore must be invalidated at Step One of the *Chevron* framework. *See Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Second, the Rule is contrary to law because it adopts an interpretation of "public charge" that had been expressly rejected by Congress, and its weighted factor test is contrary to the (i) "totality of circumstances" test mandated by INA Section 212(a)(4), (ii) Welfare Reform Act, and (iii) Rehabilitation Act. Third, the Rule is arbitrary and capricious because it fails to address evidence of the harm it inflicts on vulnerable people, and it includes factors in its public charge test that are unrelated to—and at times at odds with—its purported purpose.[11]

1. DHS's new definition of "public charge" is inconsistent with the term's plain meaning and is contrary to law

The Rule redefines "public charge" to mean "an alien who receives one or more public benefits" above the 12-month threshold. 8 C.F.R. § 212.21(a). DHS's definition fails *Chevron* Step One because it is irreconcilable with the clear meaning of the term "public charge" as demonstrated by its text, history, and context.

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[11] Because the Plaintiff States are entitled to a stay or a preliminary injunction on the APA claims, this motion need not address the Plaintiff States' other claim. *E.g.*, *Versaterm Inc. v. City of Seattle*, No. C16-1217JLR, 2016 WL 4793239, at *5 (W.D. Wash. Sept. 13, 2016).

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a. *Chevron* framework

In reviewing an agency's implementation of a statute, courts follow a two-step approach. *Chevron*, 467 U.S. 842–44; *Empire Health Found. for Valley Hosp. Med. Ctr. v. Price*, 334 F. Supp. 3d 1134, 1145 (E.D. Wash. 2018). First, using the "traditional tools of statutory construction," the court first determines whether "the intent of Congress is clear." *Id.* at 842 & n.9; *FDA v. Brown & Williamson Tobacco Corp.* (*Brown & Williamson*), 529 U.S. 120, 132 (2000) ("traditional tools" include the statute's text, history, structure, "context"—including its place among other statutes enacted previously or "subsequently"—as well as "common sense"); *Empire Health*, 334 F. Supp. 3d at 1145. If Congress's intent is clear, "that is the end of the matter." *Chevron*, 467 U.S. at 842–43. If not, and the statute "is silent or ambiguous with respect to the specific issue," the court determines "whether the agency's answer is based on a permissible construction of the statute." *Id.*

b. Public charge means a person primarily dependent upon the government for subsistence

The *Chevron* Step One inquiry into statutory meaning begins with the language of the statute. *Ranchers-Cattlemen Action Legal Fund v. United States Dep't of Agric.*, No. 2:17-CV-223-RMP, 2018 WL 2708747, at *7 (E.D. Wash. June 5, 2018). The text of the original 1882 public charge exclusion provided that a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . . shall not be permitted to land." Immigration

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Act of 1882, ch. 376, § 2, 22 Stat. 214. The most natural reading of "public charge" in the 1882 statute is one who is, as the text says, "unable to take care of himself or herself." *Id.*

Because the statute does not define "public charge," it must be presumed that the 47th Congress intended the term to have its "ordinary or natural meaning" in the "year [it] was enacted." *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). The period's most comprehensive American dictionary defined the root word "charge" to mean "[a]nything committed to another's custody, care, concern, or management." *The Century Dictionary of the English Language* vol. IV at 929 (1889–91). This definition is consistent with historical definitions where "public charge" was interchangeable with "pauper." *See id.* vol. XI at 4334 (defining "pauper" as "a very poor person; a person entirely destitute of property or means of support; particularly one who, on account of poverty, becomes *chargeable to the public*") (emphasis added); *accord* Webster, *An American Dictionary of the English Language* 595 (1857).

This definition endured over time. *See Black's Law Dictionary* 311 (3d ed. 1933) (defining "public charge" as "[a] person whom it is necessary to support at public expense by reason of poverty, insanity, and poverty, disease and poverty, or idiocy and poverty" and—as used in the Immigration Act of 1917, Pub. L. 301, 39 Stat. 874—to include "paupers"); *Black's Law Dictionary* 233 (6th ed. 1990)

(an "indigent[; a] person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty").

c. The history of the public charge exclusion confirms that Congress adopted the term's common law meaning

i. Colonial and early state law sources

Congress adopted the public charge exclusion against a long backdrop of colonial and state public charge laws. Because Congress based the Immigration Act of 1882 on those earlier laws, the term "public charge" "must be construed as they were understood at the time in the State[s]." *Shannon v. United States*, 512 U.S. 573, 581 (1994) (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 36 (1899)).

In the American colonies, "public charges" were persons permanently incapable of caring for themselves and primarily dependent on the government, similar to a pauper. As Defendant USCIS acknowledges, due to opposition to "the immigration of 'paupers,' . . . several colonies enacted protective measures to prohibit the immigration of individuals who might become public charges." *Public Charge Provisions of Immigration Law: A Brief Historical Background*, USCIS, https://www.uscis.gov/history-and-genealogy/our-history/public-charge-provisions-immigration-law-a-brief-historical-background#_ftnref1 (USCIS *Public Charge Hist. Backgr.*); *see also* Mass. Gen. Ct., Acts and Resolves 552, § 2 (Mar. 14, 1700); ECF No. 31 (First Amended Complaint for Declaratory and Injunctive Relief (FAC)) ¶ 46.

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State laws of the 19th century reflect the same original meaning of "public charge." In response to mass migration of "large numbers of exceptionally impoverished and destitute people" from Europe in the 1800s, states adopted passenger laws limiting immigration of such persons—who were described as "public charges," "paupers," or both. Hirota, *Expelling the Poor* 33; *see, e.g.*, Act of Mar. 20, 1850, ch. 105, § 1, 1850 Mass. Acts & Resolves 338, 339 (excluding without a bond any "pauper, . . . destitute, or incompetent to take care of himself or herself without becoming a public charge as a pauper"); FAC ¶ 48 (citing similar New York, Rhode Island, and Maine laws).

Early cases evidence this common law understanding of "public charge," which required more than simply having "no visible means of support," *City of Boston v. Capen*, 61 Mass. 116, 121–22 (1851), but that persons be "unable to take care of themselves," *In re O'Sullivan*, 31 F. 447, 449 (C.C.S.D.N.Y.) (quoting 22 Stat. 214); *see, e.g.*, *Fischer v. Meader*, 111 A. 503, 504 (N.J. 1920) ("abandoned child" in "legal effect . . . became a public charge, and a ward of the state as parens patriae"); *Pine Twp. Overseers v. Franklin Twp. Overseers*, 4 Pa. D. 715, 716, 1894 WL 3774, at *2 (Pa. Quar. Sess. 1894) ("both mother and child, the present pauper, were public charges for maintenance and support"); *Bunker v. Ficke*, 6 Ohio Dec. Reprint 978, 979, 1880 WL 5770 (Ohio Dist. 1880) ("The obvious intention of the framers of the constitution being to regard insane

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persons as the wards of the state, to be under the fostering and protecting charge of the state . . .").

ii. The Immigration Act of 1882

Congress enacted the first federal public charge exclusion in 1882 to fill the void left from the Supreme Court's invalidation of state passenger laws. *See Henderson v. Mayor of City of New York*, 92 U.S. 259, 274 (1875). Borrowing directly from state laws to impose a federal public charge ground of inadmissibility, the 1882 Congress described "public charge" to express its traditional, common law meaning—a person "unable to take care of himself or herself," Immigration Act of 1882, 22 Stat. 214—who primarily depends on the government for support. This understanding is reflected in the legislative history. *See* Complaint ¶ 62, *Make the Road New York, et al. v. Cuccinelli, et al.*, No. 19-cv-07993 (S.D.N.Y. filed Aug. 27, 2019) (*Make the Road* Compl.), Bays Decl. Ex. DDD;[12] *In re Day*, 27 F. 678, 681 (C.C.S.D.N.Y. 1886). Indeed, the 1882 Act created a federal immigration head-tax which was used in part for the "relief" of immigrants in economic "distress"—*i.e.*, those who were poor but not so destitute as to be considered public charges. 22 Stat. 214. Later bills

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[12] The FAC and the *Make the Road* Complaint both contain fuller discussions of the legislative history of the relevant immigration statutes than space limitations permit here, including citations to the congressional record and congressional reports. Plaintiffs incorporate those citations by reference.

changed the wording of the clause to "likely to become a public charge," and this language has remained in the statute to the present. *Make the Road* Compl. ¶ 60 n.12.

iii. Immigration and Naturalization Act of 1952 and subsequent enactments

Congress overhauled federal immigration law in the Immigration and Nationality Act of 1952 and reenacted the public charge exclusion. Pub. L. 82–414, 66 Stat. 163. The legislative history of the INA shows that Congress intended to retain the common law meaning of "public charge." *See* S. Rep. No. 1515, 81st Cong., 2d Sess., at 349 (1950) ("The subcommittee recommends that the clause excluding persons likely to become public charges should be retained in the law.").

In 1990, Congress amended the INA to remove the "paupers, professional beggars, or vagrants" exclusions, but it retained the public charge inadmissibility ground. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(4), 104 Stat. 4978, 5072 (codified as amended at 8 U.S.C. § 1182).

iv. Welfare Reform and Immigration Reform Acts

Congress enacted two major immigration reform statutes in 1996. Neither statute purported to redefine "public charge" or alter the traditional and established understanding of the term.

First, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. 104-193, 110 Stat. 2105 (1996)

(codified as amended at 8 U.S.C. §§ 1601-46), restricted certain noncitizens' eligibility for most federal benefits.[13] At the same time, Congress allowed all "qualified" immigrants—including lawful permanent residents—to receive after five years of entry many forms of federal public benefits included in DHS's Rule. These include Medicaid, TANF, and SNAP. 8 U.S.C. §§ 1612(a)(2)(L), 1613(a). The "five-year ban" does not apply to certain benefits swept up in the Rule, including Section 8 housing vouchers. *Id.* §§ 1612(a)(2)(A) & (a)(2)(C), 1613(b)(1)–(2).[14]

Second, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Immigration Reform Act)—enacted one month after the Welfare Reform Act—reenacted the existing INA public charge provision and codified the existing standard in case law for determining whether a noncitizen was

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[13] Prior to the Welfare Reform Act, lawfully present immigrants were generally eligible for many public benefits on similar terms as U.S. citizens. *See* H.R. Rpt. 104-725, 104th Cong., 2d Sess., July 30, 1996, at 379.

[14] States are authorized to determine the eligibility of qualified immigrants for some federal programs (TANF, social services block grants, and Medicaid). 8 U.S.C. § 1612(b)(1). Each state may determine the eligibility for any state public benefits, and a state may statutorily provide that "an alien who is not lawfully present in the United States is eligible for any State or local public benefit." 8 U.S.C. §§ 1621(d), 1622(a).

inadmissible as a public charge. 8 U.S.C. § 1182(a)(4). It provided that a public charge determination should take account of the "totality of circumstances" and codified the five factors long applied by immigration officials: the applicant's (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills. Pub. L. 104-208, Div. C, 110 Stat. 3009, Sec. 531(a)(4)(B) (codified as amended at 8 U.S.C. § 1182(a)(4)(B)(i)). Neither of those 1996 statutes altered the well-established meaning of "public charge" under the INA.

v. Congress repeatedly rejected the definition of "public charge" DHS now adopts

Congress's decision to maintain the definition of "public charge" was no oversight. To the contrary, Congress repeatedly considered and rejected proposals to amend the INA public charge provisions to apply to persons who receive (or are considered likely to receive) the benefits DHS now deems off-limits. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks and citation omitted).

In the debate leading up to enactment of the Immigration Reform Act, Congress considered and rejected a proposal to label anyone who received means-tested public benefits a public charge. Immigration Control and Financial

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Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996); Pub. L. 104-208, Div. C, 110 Stat. 3009. The express purpose of this provision was to overturn the settled understanding of "public charge" found in the case law. *See Make the Road* Compl. ¶¶ 81–83.

In 2013, Congress repelled another effort to broaden the scope of the public charge exclusion in a manner similar to DHS's new definition. An amendment proposed by then-Senator Jefferson B. Sessions to the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013), would have altered the definition of public charge to require applicants to show "they were not likely to qualify even for non-cash employment supports such as Medicaid . . . [and] SNAP." S. Rep. No. 113-40, at 42 (2013). Once again, the Senate rejected the amendment. *Id.*

By adopting virtually the same definition of "public charge" that Congress rejected in 1996, the Rule contravenes the unambiguous meaning of the statute.

d. The context of the public charge exclusion confirms that Congress intended the term "public charge" to retain its common law meaning

In *Chevron* Step One, the court also "must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme." *Brown & Williamson*, 529 U.S. at 121 (internal quotation marks and citation omitted). That "context" includes parallel statutory provisions, "other Acts," *id.*,

and "the statutory backdrop of . . . agency directives," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

i. Early judicial and agency interpretations

During the first half of the 20th century, early judicial interpretations of the original public charge provisions confirmed Congress's intent to exclude only those primarily dependent on the government for their care or management. *See, e.g.*, *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) ("[w]e are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future"); FAC ¶ 51 (collecting cases). Federal agencies charged with enforcing those early federal immigration laws also read "public charge" to mean a person incapable of self-support and dependent upon the state for survival. *See* USCIS *Public Charge Hist. Backgr.* ("immigrants who showed they had no physical or mental conditions that could prevent them from working and who demonstrated a willingness to work were admitted"); FAC ¶ 53.

ii. Modern agency interpretations

Consistent with the original public meaning of "public charge," federal immigration authorities have applied the modern public charge provision only to those dependent on government for survival. *See, e.g.*, *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (A.G. 1962) (then-Attorney General Robert F. Kennedy detailing the public charge doctrine's "extensive judicial interpretation" and

explaining that the INA "requires more than a showing of a possibility that the alien will require public support"); U.S. Dep't of Justice, Final Rule: *Adjustment of Status for Certain Aliens*, 54 FR 29,442-01 (July 12, 1989) (codified in relevant part at 8 C.F.R. §§ 245a.2(k)(4), 245a.3(g)(4)(iii), 245a.4(b)(1)(iv)(C)) (even where an immigrant's "income may be below the poverty level," he is "not excludable" if he "has a consistent employment history which shows the ability to support himself"); *Make the Road* Compl. ¶¶ 70–71. Congress' reenactment of the INA's public charge exclusion "against the backdrop of" these "consistent and repeated statements" by immigration enforcement agencies precludes DHS's novel definition in the Rule. *Brown & Williamson*, 529 U.S. at 144.

iii. Post-1996 Agency Field Guidance confirms the settled interpretation of "public charge"

In 1999 Field Guidance, INS confirmed that the Welfare Reform and Immigration Reform Acts did not change the "longstanding" law governing public charge inadmissibility.[15] To the contrary, the meaning of "public charge"

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[15] Following the Welfare Reform Act, public confusion emerged about the relationship between receipt of federal, state, or local benefits and the public charge provisions of federal immigration law. *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. at 28,689-01, 28,689 (May 26, 1999) (Field Guidance). According to the U.S. Department of State, "such confusion led many persons in the immigrant community to choose

"has been developed in several [INS], BIA, and Attorney General decisions" and codified in INA "section 212(a)(4) itself" in its " 'totality of circumstances' test." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28,689; 28,690 (May 26, 1999).

Consistent with the common law definition, INS confirmed that "likely to become a public charge" means "likely to become . . . primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense." *Id.* at 28,692. The Field Guidance expressly excluded from the public charge determination noncash benefits such as Medicaid (for those not institutionalized), nutrition programs like SNAP, and housing benefits. INS noted that it had "never been [INS] policy that any receipt of services or benefits paid for in whole or in part from public funds . . . indicates that the alien is likely to become a public charge." *Id.* The Field Guidance governed the agencies responsible for public charge inadmissibility determinations, including

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not to sign up for important benefits, especially health-related benefits, which they were eligible to receive" out of "concern[s] it would affect their or a family member's immigration status." U.S. State Department Cable, INA 212(A)(4) Public Charge: Policy Guidance, Ref: 9 FAM 40.41 (State Department cable). INS issued the Field Guidance for public charge determinations to eliminate the confusion. 64 Fed. Reg. at 28,689-01.

DHS, for more than two decades. *See, e.g.*, U.S. Dep't of Justice, Public Charge Fact Sheet, 2009 WL 3453730 (Oct. 29, 2011); Public Charge Fact Sheet, USCIS, Apr. 29, 2011.

2. The Rule adopts an interpretation expressly rejected by Congress

The Rule also is contrary to law because it adopts a statutory interpretation explicitly disavowed by Congress. Here, Congress has repeatedly rejected the "transformative" immigration policy the Administration now purports to establish.[16] *See supra* at 29–30.

The Ninth Circuit has already admonished this administration for seeking to "coopt Congress's power to legislate" through executive actions. *City & County of San Francisco*, 897 F.3d at 1234 (Rejecting Executive Order regarding sanctuary cities, reasoning "Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order . . . . Not only has the Administration claimed for itself Congress's exclusive spending power, it has also attempted to coopt Congress's power to legislate."); *see also Brown & Williamson*, 529 U.S. at 147 (holding FDA lacks authority to regulate tobacco products as customarily marketed and noting that "before enacting the FCLAA in 1965, Congress considered and rejected several proposals to give the FDA the

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[16] Sullivan & Shear, *Trump Sees an Obstacle to Getting His Way on Immigration: His Own Officials*, *supra* note 4.

authority to regulate tobacco"); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 821 (E.D. Pa. 2019), *aff'd sub nom. Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), as amended (July 18, 2019) (rejecting agency interpretation because, in part, "Congress [previously] explicitly rejected an attempt to add to the ACA an exemption similar to that contained in the Final Rules").

As Judge Srinivasan on the DC Circuit observed, "[a]n activist President with control over the rulemaking process could use his power to press agencies beyond statutory limits that he was unable to persuade Congress to remove. Such a President would be guilty of unfaithful execution of the laws." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 414 (D.C. Cir. 2017) (quoting Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443, 455 (1987)).

3. The Rule's weighted criteria are contrary to law

DHS's new definition of "public charge," based on its unwarranted focus on poverty, distorts the "totality of circumstances" test. This fundamental error compels invalidation of the rule. *See, e.g.*, *Davis Cty. Solid Waste Mgmt. v. U.S. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam); *North Carolina v. EPA*, 531 F.3d 896, 929, *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

a. The weighted criteria are contrary to the INA and Immigration Reform Act

The Rule's new public charge test transforms the "totality of circumstances" inquiry mandated by Congress into a categorical test of DHS's

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own making. Because the four "heavily weighted negative factors" overlap with other enumerated "negative" factors, any one heavily weighted negative factor may trigger a public charge finding under the new Rule. The new test as written treats one main consideration—poverty—as paramount, if not dispositive, elevating it above the required statutory factors set forth in the INA itself.

The heavily weighted factor of whether an immigrant "has received or has been certified or approved to receive one or more public benefits" above the 12-month threshold is duplicative of several other negative factors: an immigrant who met or exceeded the public benefits threshold will *ipso facto* have "applied for or received any public benefit" in any amount and be virtually certain to have a "gross income [of] less than 125 percent" of the FPG (both of which are nominally separate negative, but not heavily weighted, factors). 8 C.F.R. § 212.22(b)(4)(i)(A), (b)(4)(ii)(E)(1). The past receipt of public benefits above the 12-month threshold appears dispositive, contrary to the INA's mandated totality of circumstances inquiry. *See, e.g.*, *Martinez-Farias v. Holder*, 338 F. App'x 729, 730–31 (9th Cir. 2009) (in making public charge determination, INA Section 212(a)(4)(B) requires decision maker to consider all statutory factors).

The Rule likewise makes an immigrant's medical condition virtually dispositive. A medical condition counts as a heavily weighted negative factor if the following two conditions apply: (1) the immigrant "has been diagnosed with a medical condition that is likely to require extensive medical treatment or

institutionalization or that will interfere with [his or her] ability to provide for himself or herself, attend school, or work;" and (2) the immigrant "is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition." 8 C.F.R. § 212.22(c)(1)(iii). This heavily weighted factor is duplicative of other, ostensibly separate, negative factors. *See, e.g.*, 8 C.F.R. § 212.22(b)(2)(ii)(B) (treating as negative factor if immigrant "has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with [his or her] ability to provide and care for himself or herself, to attend school, or to work"). Because the medical condition factor is likely to be dispositive under the Rule's weighted test, it is contrary to the totality of circumstances inquiry mandated by the INA.

The overlapping medical condition factors are contrary to the INA for another reason: they go well beyond the discrete "health-related grounds" that Congress has expressly set forth as basis of inadmissibility. 8 U.S.C. § 1182(a)(1)(A). Under INA Section 212(a)(1), a noncitizen is inadmissible for health-related reasons only if he or she (1) has a "communicable disease of public health significance"; (2) failed to submit proof of vaccinations; (3) has or had a "physical or mental disorder and a history of behavior associated with the disorder" posing a present "threat to the property, safety, or welfare" of the immigrant or others; or (4) has been determined to be a "drug abuser or addict."

Id. The provision of those limited health-based grounds of inadmissibility strongly suggests that Congress did not intend for the Department to create much broader health-based exclusions under the guise of a public charge regulation. *See, e.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (maxim of *expressio unius est exclusio alterius*).

The statutory history makes that intent even clearer. The 1952 INA's health-related exclusions were much broader, rendering inadmissible anyone who was "insane," "epilep[tic]," or who had "a physical defect disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living." 66 Stat. 163, 182, § 212(a). Congress eliminated those grounds of exclusion in the Immigration Act of 1990, 104 Stat. 4978, § 601. Yet the Department has now engrafted that broad health exclusion onto its new public charge test, despite Congress having stripped it from the INA decades ago. In this respect, the Rule is contrary to the text of the statute and the clearly expressed intent of Congress. *See, e.g.*, *Cal. Cosmetology Coal. v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) ("A regulation may not serve to amend a statute, nor add to the statute 'something which is not there.'") (citation omitted) (quoting *United States v. Calamaro,* 354 U.S. 351, 359 (1957)).

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b. The weighted criteria are contrary to the Welfare Reform Act

The Rule's focus on immigrants' use of non-cash public benefits to deprive them of the ability to remain in the United States also is inconsistent with the Welfare Reform Act, which expressly allowed qualified immigrants to receive after five years of entry many forms of federal public benefits included in the Rule. *See supra* at 27–29. *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 147 (D. Mass. 2004) (rejecting interpretation of statute that would allow for a "bait-and-switch" where a person would be covered by the Americans with Disabilities Act up until the point she needs the act and reasoning that statute "must be interpreted to give effect to the rights [it] has created"); *see also Rotenberry v. Comm'r Internal Rev.*, 847 F.2d 229, 233 (5th Cir. 1988) ("Congress did not intend that the Secretary set a trap for the unwary.").

c. The weighted criteria are contrary to Section 504 of the Rehabilitation Act

The Rule also is contrary to the Rehabilitation Act, which prohibits "any program or activity receiving federal financial assistance" or "any program or activity conducted by any Executive agency," from excluding, denying benefits to, or discriminating against persons with disabilities. 29 U.S.C. § 794(a). The Rule violates this provision by requiring officials to consider an applicant's "medical condition"—including a "disability diagnosis"—to weigh in favor of a public charge determination. *See* 8 C.F.R. § 212.22(c)(1)(iii)(A); 84 Fed. Reg. at 41,407–08. Such facially discriminatory treatment will be exacerbated by the

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consideration of other negative factors related to a disability, such as receipt of Medicaid home and community-based services. *See* 8 C.F.R. §§ 212.21(b)(5), 212.22(b)(4)(E); 84 Fed. Reg. at 41,367–68; *see also* 42 U.S.C. § 1396n(i).[17] Because the Rule's overlapping criteria operate in such a way that an applicant's disability will often be the "but for" cause of a public charge determination, it violates Section 504. *See, e.g.*, *D.F. ex rel. L.M.P. v. Leon Cty. Sch. Bd.*, No. 4:13CV3-RH/CAS, 2014 WL 28798, at *2 (N.D. Fla. Jan. 2, 2014) (under Rehabilitation Act, plaintiff's disability must be a "but for" cause of the denial of services, but the disability need not be the "sole" cause); *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013); *Lovell v. Chandler*, 303 F.3d 1039, 1053 (9th Cir. 2002).

4. The Rule is arbitrary or capricious

A regulation is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

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[17] Moreover, receiving Medicaid services will disqualify many disabled applicants from two independent *positive* public charge factors: private health insurance and sufficient household assets to cover reasonably foreseeable medical costs. *See* 8 C.F.R. § 212.22(c)(2)(iii); 84 Fed. Reg. at 41,299 (explaining the first "heavily weighted positive factor" is "in addition to the [second] positive factor").

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counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43 (1983). When an agency departs from a well-established prior policy that "engendered serious reliance interests"—as DHS has done here—the agency must provide a more "detailed justification" for its actions. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). DHS has failed to do so.

DHS received over 265,000 comments—the "vast majority" of which opposed the Rule and provided compelling evidence of devastating harms likely to result from its implementation. 84 Fed. Reg. at 41,304; *see, e.g.*, Bays Decl. Exs. H–CCC (examples of comments submitted in opposition to the Rule). DHS largely ignored these concerns and instead chose to finalize—without sufficiently reasoned justification—a Rule that all but promises to inflict the very harms warned of by commenters. Where DHS did address concerns, it largely brushed them aside, stating in conclusory fashion that it did not intend to cause the harms at issue or the purported goal of the Rule merited the trade-off. The Rule is arbitrary and capricious for two primary reasons: (1) DHS failed to address, justify, or even meaningfully evaluate the many significant harms identified by commenters; and (2) the Rule promotes the consideration of factors entirely unrelated to—and at times directly at odds with—its purported purpose.

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a. DHS failed to justify or meaningfully address the Rule's many devastating harms

DHS has failed to address drastic harms the Rule will cause, including to public health generally and to vulnerable populations specifically, such as children, the elderly, and individuals with disabilities.

i. DHS disregarded evidence the Rule will cause public health crises

DHS received compelling evidence and comments warning the Rule was likely to cause significant public health crises. *See, e.g.*, Bays Decl. Exs. R at 31–32; T at 107–09. By deterring participation in Medicaid, the Rule would result in decreased vaccinations and a corresponding increase in the transmission of communicable diseases. 84 Fed Reg. at 41,384 (noting comments stating that "uninsured individuals are much less likely to be vaccinated," and that "even a five percent reduction in vaccine coverage could trigger a significant measles outbreak"); Bays Decl. Exs. J at 2–3 ("Discouraged access to preventive services would inevitably have a devastating impact on immunization coverage for immigrant populations."); FF at 3 ("[D]ecreased vaccinations and untreated communicable diseases will place the American public at risk for outbreaks.").

DHS also received comments identifying a host of other public health crises likely to result from the Rule, including malnutrition, unintended pregnancies, substance abuse, obesity, homelessness, untreated chronic illnesses, and mental health disorders. *See, e.g.*, Bays Decl. Exs. O at 1–2, AA at 2, EE at 2–3, GG at 1, HH at 1, II at 2, NN at 3 (warning of harm to individuals suffering

from chronic medical conditions and diseases such as Hepatitis B, HIV, tuberculosis, and blood cancers such as lymphoma and leukemia); Exs. OO at 7, QQ at 2 (warning of reduced early detection and treatment of sexually transmitted diseases); Ex. M at 6 (warning of reduced access to family planning resources).

DHS acknowledged the Rule may lead to these public health crises. *See, e.g.*, 83 Fed. Reg. at 51,270 ("[D]isenrollment or forgoing enrollment in public benefits program by [otherwise eligible] aliens" may result in, among other things, increased obesity, malnutrition, and transmission of communicable diseases). Nevertheless, DHS still has not conducted any adequate analysis to measure the public health effects on the American public. *See, e.g.*, Bays Decl. Ex. J at 2 ("[W]e are concerned that [DHS] failed to quantify the human and economic impact from [either] the increased prevalence of communicable diseases [or] the fact that the prevalence could be exacerbated by fewer vaccinated individuals."). DHS instead responded that it would exempt from consideration receipt of Medicaid benefits only for pregnant women and individuals under 21 years of age. *See* 84 Fed. Reg. at 41,384 (asserting, without evidentiary support, that these exemptions "should address a substantial portion, though not all, of the vaccinations issue").

DHS's cursory response disregards overwhelming evidence that even a slight decrease in population immunity may give rise to a dangerous outbreak of communicable diseases. Bays Decl. Exs. J at 2–3, T at 107–09. And, DHS's

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response—if any—to the other likely public health crises is even more problematic. *See* 84 Fed. Reg. at 41,384 (arguing without analysis that, in lieu of Medicaid, unidentified "local health centers and state health departments may provide certain health services addressing substance abuse and mental disorders"). DHS's failure to appropriately analyze or respond to overwhelming evidence of potentially devastating public health crises underscores that the Rule is arbitrary and capricious.

ii. DHS disregarded evidence of the Rule's harmful effects on children

DHS received numerous comments and compelling evidence showing the Rule would inflict dramatic and lasting harms on vulnerable children. Commenters explained that the Rule will cause at-risk children to suffer increased hunger, malnutrition, and homelessness. Commenters also provided evidence showing the trauma resulting from childhood food insecurity and housing instability is likely to have lifelong effects, severely compromising these children's physical and mental health, educational outcomes, and employment prospects. Bays Decl. Exs. S at 32–35; VV at 12–13. The lasting trauma of such childhood instability results in a broad variety of negative outcomes, including chronic asthma, higher incidences of unplanned pregnancies, substance abuse, depression, and behavioral challenges. *Id.*; Bays Decl. Exs. T at 61–62; V at 4.

While detailing the harms the Rule will inflict upon vulnerable children, commenters also questioned what reasonable basis DHS had for applying such a

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rigid public charge analysis to children in the first place, as they are too young to work and their use of public benefits is not probative of their likelihood of becoming a public charge when older. Bays Decl. Ex. T at 74-78. DHS itself agrees the programs at issue are intended to *help* children become healthy, safe, and successful in their educations, thus improving their employment prospects and moving them toward the Rule's purported goal of self-sufficiency. 84 Fed. Reg. at 41,370–71 (acknowledging "many of the public benefits programs [at issue] aim to better future economic and health outcomes for minor recipients").

In response, DHS merely amended the Proposed Rule to exclude from consideration only the receipt of Medicaid benefits by individuals under 21. DHS will still, however, consider a young child's receipt of SNAP or federal housing assistance as evidence the child is likely to become a public charge. DHS's failure to address the overwhelming evidence showing children will suffer severe harms from the Rule's implementation (directly undermining their chances of reaching DHS's purported goal of "self-sufficiency") is arbitrary and capricious, underscoring the Plaintiff States' likelihood of success on the merits.

iii. DHS disregarded the Rule's harmful and discriminatory effects on the elderly and individuals with disabilities

DHS received many comments detailing the discriminatory and harmful effects the Rule will have on the elderly and individuals with disabilities. *See, e.g.*, 84 Fed. Reg. at 41,367. For example, commenters noted that counting an

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individual's disability as a negative health factor was discriminatory and would overlap with other factors. Bays Decl. Ex. X at 6 ("[T]he proposed formula effectively authorizes blanket determinations that anyone with a significant disability is likely to become a public charge."). Further, many of the services on which people with disabilities rely are available only through Medicaid, meaning the Rule will separate these already-vulnerable individuals from the very services that assist them in reaching DHS's purported goal of "self-sufficiency." Bays Decl. Exs. JJ at 6; L at 9–10 ("Individuals with significant disabilities, including even highly educated professionals and business owners, typically must retain Medicaid coverage because no other public or private program covers the attendant care and equipment they need to get up, get dressed, and go to work.").

Similarly, the Rule focuses almost exclusively on the age and economic value of elderly applicants, ignoring the many other contributions they make to family stability, including caring for children and enabling other family members to work. Bays Decl. Ex. S at 80. Preventing these elderly applicants from accessing benefits they have paid for with their taxes would *reduce* their self-sufficiency, severely endanger their health, and make it more difficult for them to live with and contribute to their families. Bays Decl. Ex. KK at 7–9.

DHS readily conceded the potentially "outsized impact" the Rule might have on specific vulnerable populations, including individuals with disabilities. 84 Fed. Reg. at 41,368. DHS largely dismissed such concerns, however, noting

simply that age and health are statutory factors and "it is not the intent, nor is it the effect of this rule to find a person a public charge *solely* based on his disability." *Id.* (emphasis added). But, as commenters noted, DHS's selection of arbitrary, poorly defined, and overlapping factors will not only inflict severe harm on these already vulnerable populations but will also give immigration officials unfettered discretion to deem them public charges. Bays Decl. Exs. L at 12–14; X at 6. DHS's disregard for the evidence it received, as well as its refusal to meaningfully address the discriminatory and lasting harms on these populations, underscores the arbitrary and capricious nature of the Rule.

b. DHS ignored evidence showing the factors in the public charge analysis are arbitrary and capricious

DHS's multifactor test is itself arbitrary and capricious. As set forth below, DHS relies on vague, poorly defined factors that are inconsistent with—and often directly at odds with—the Rule's purported purpose, further demonstrating the lack of any "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43; Bays Decl. Ex. R at 40. Below are a few such examples.

i. Income thresholds

The Rule imposes arbitrary income thresholds for making public charge determinations, despite DHS's own evidence that such thresholds are unrelated to the Rule's stated purpose. Under the Rule, an income "below [the] level of 125 percent of FPG would generally be a heavily weighed negative factor," 84 Fed.

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Reg. at 41,332, while a household income higher than 250% of the FPG ($64,375 annually for a family of four) would be "heavily positive." 84 Fed. Reg. at 41,502-04; 8 C.F.R. § 212.22(c). Many commenters, however, noted the arbitrary and capricious nature of these thresholds, as well as the devastating effects they will have on hardworking, law-abiding immigrants. *See, e.g.*, Bays Decl. Ex. R at 47–48 (warning that under the arbitrary income thresholds, "nearly 200,000 married couples in the United States would be faced with a wrenching choice: leave the United States, or live apart").

DHS's reliance on these income thresholds is irrational based also on DHS's own evidence and data. In the Proposed Rule's preamble, DHS defended the income thresholds on the ground "[t]he percentage of people receiving these public benefits generally goes down as the income percentage increases." 83 Fed. Reg. at 51,204. This assertion rings hollow, though, as eligibility for public benefits is generally means-tested based on an applicant's income. DHS's data shows that even immigrants in the lowest-income group analyzed—those with incomes below 125% of FPG—were in general *unlikely* to receive such public benefits. 83 Fed. Reg. at 51,204 tbl. 28. Medicaid, the most-utilized public benefit received by the group, had a participation rate of 39.2%. Further, such rigid income thresholds may lead to the perverse result that an applicant who works full-time making minimum wage but has never used *any* of the benefits at issue would be assigned a negative factor and branded a public charge. In

"contradict[ing] the evidence before" DHS, the Rule is "internally inconsistent," "arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015).

ii. English proficiency

DHS treats as a negative factor an immigrant's "lack of English proficiency." 84 Fed. Reg. at 41,435. DHS cites no evidence suggesting that immigrants "lacking English proficiency"—a vague and poorly defined factor—are "more likely than not at any time in the future" to receive the public benefits at issue. 84 Fed. Reg. at 41,501. Instead, DHS starts from its conclusion and works backward, asserting that in a USCIS survey of noncitizens, the rate of enrollment in non-cash benefits programs was lower among "those who spoke English either well or very well (about 15 to 20 percent)" compared to "those who either spoke English poorly or not at all (about 25 to 30 percent)." 84 Fed. Reg. at 41,448. As numerous commenters noted, DHS's reliance on such an arbitrary, undefined factor not only affords undue discretion to immigration officials but also ignores a wealth of evidence demonstrating that an immigrant's language proficiency is not an immutable characteristic making them likely to become a public charge. *See, e.g.*, Bays Decl. Ex. XX at 6–7 ("Although non-citizens who are limited English proficient may face initial challenges in obtaining certain jobs, their ability to speak another language may serve them

well economically in the long run."); *see Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1251 (9th Cir. 2001) (agency action was "arbitrary and capricious" based on "lack of an articulated, rational connection" between regulatory condition and purpose as well as the "the vagueness of the condition itself"). And, DHS's own data once again undermines its conclusion, as its survey shows immigrants with limited English proficiency were more likely *not* to utilize public benefits. 83 Fed. Reg. at 51,195 tbl. 24.

iii. Credit scores

The Rule considers credit reports and credit scores in the public charge analysis. 84 Fed. Reg. at 41,425. DHS's reliance on such evidence is not justified, as there is no evidence credit scores or reports have any relevance in determining whether someone is likely to become a public charge. Bays Decl. Exs. Y at 1–3; Z at 1–3; TT at 1–4; ZZ at 1–3. Consideration of credit reports in this context is arbitrary, as (1) immigrants are likely to have no or thin credit histories and artificially low credit scores; (2) credit reports are not generally available in languages other than English, which could limit immigrants with language barriers from correcting errors (thus double-counting English proficiency in the public charge analysis); and (3) a bad credit score is frequently the result of a temporary circumstance such as illness or job loss and does not reflect whether someone is likely to become a public charge. Further, credit reports suffer from unacceptable rates of inaccuracy, with at least 21% of consumers having verified

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errors on their reports. Bays Decl. Exs. Y at 1–3; Z at 2. DHS offers no rationale for introducing such dramatically high error rates into the public charge analysis, and although it promises not to consider "verified errors," the process for consumers to address such errors is extremely burdensome—especially for immigrants—and private credit reporting agencies may still fail to correct them.

* * *

For the reasons stated above, the Plaintiff States are likely to prevail on the merits of their claims that the Rule violates the APA because it is contrary to law and arbitrary or capricious.

C. Absent a Stay or Injunctive Relief, the Plaintiff States Will Suffer Immediate and Irreparable Harm

Were the Final Rule to take effect, the Plaintiff States are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Because the Final Rule will cause mass disenrollment and forbearance from enrollment by immigrants from federal and state benefits programs, it will result in worsened health, nutrition, and housing outcomes for those individuals. This vitiates the purposes of state programs, results in deterioration in health and well-being for state residents, and exponentially increases the financial burden on the States.

1. Categories of irreparable harm to be considered by the Court

The Rule triggers three forms of irreparable harms. First, "ongoing harms to [the Plaintiff States'] organizational missions." *Valle Del Sol v. Whiting*,

723 F.3d 1006, 1029 (9th Cir. 2013); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016); *E. Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1109. Second, negative "consequences for public health" and well-being. *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1074 (N.D. Cal. 2018); *see also California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 830 (N.D. Cal. 2017), *aff'd in pertinent part sub nom. California v. Azar*, 911 F.3d 558 (9th Cir. 2018). Indeed, the Ninth Circuit has held repeatedly that loss of public health benefits constitutes irreparable injury. *See M.R. v. Dreyfus*, 697 F.3d 706, 732–33 (9th Cir. 2012); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982). Third, uncompensable economic harm—which may include "budget uncertainty" experienced by government organizations that cannot "budget, plan for the future, and properly serve their residents," *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017). *California v. Azar*, 911 F.3d at 581; *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *California v. Health and Human Servs.*, 351 F. Supp. 3d 1267, 1298 (N.D. Cal. 2019).

2. Disenrollment from federal and state programs will result in irreparable harm to health care, nutrition, and housing

The direct disenrollment from the listed federal programs, and anticipated chilling effects to enrollment in state benefit programs, will result in irreparable harms to state residents, the mission of state programs, and ultimately to state treasuries. Proposed Rule, *Inadmissibility on Public Charge* Grounds, 83 Fed.

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Reg. at 51,114, 51,266–69 (Oct. 18, 2019); 84 Fed. Reg. at 41,312 (conceding that the Rule will result in significant disenrollment by immigrants); *see supra* at 10–12.

The initial, and potentially most significant, area affected by disenrollments as a result of the Rule is health care. Medicaid is a vital source of preventative care, lessens financial hardship, helps women have healthy pregnancies, and reduces preventable mortality. *See supra* at 12–13. Even under DHS's estimate, were 2.5% of immigrants to choose to forgo health care to protect their immigration status, the results would be immediate, predictable and irreversible. *See supra* at 11. Put simply, "[p]eople will die. The anxiety and fear generated in the immigrant population will lead to people not seeking care for emergent conditions (heart attacks, for example)." Oliver Decl. ¶ 21.

Beyond the individual effect, a lack of health care harms entire families because those who disenroll may be deterred from seeking coverage for their dependent children, no matter the minor's immigration status. *See supra* at 13–14. Furthermore, this disenrollment will have community-wide effects, including the prevalence of disease "among members of the U.S. citizen population who are not vaccinated." 83 Fed. Reg. at 51,270; 84 Fed. Reg. at 41,384; *see supra* at 13–14. Finally, forgone health care coverage and preventative care, as DHS admits, will cause higher and more frequent emergency services and uncompensated care costs, as immigrants without

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healthcare turn to the emergency room for care. 84 Fed. Reg. at 41,384; *see supra* at 14. These increased costs "shall now fall solely on the [States'] taxpayers," harming the Plaintiff States' financial health. Pryor Decl. ¶ 10.

Second, the Final Rule will also create food insecurity, resulting in increased costs to the Plaintiff States and the frustration of programs which aim to create a well-nourished, productive population. SNAP, and corresponding state programs, will likely suffer reduction in enrollees. *See supra* at 14–15. When immigrants make the heartbreaking decision to forgo food assistance to maintain immigration status, the effects are threefold. First, and most immediately, more families, including those with U.S. citizen children become hungry. *See supra* at 15–16. Second, disenrollment results in losses to economic activity and productive output, thus harming the Plaintiff States' economies. *See supra* at 15–16. The State of Illinois, alone, estimates a loss to its economy of $95 to $222 million in economic stimulus because of immigrant withdrawals from SNAP. Hou Decl. ¶ 23. Finally, hungry children use more state resources—educational, social services, and health care. *See supra* at 15–16.

Third, immigrant disenrollment in federal and state housing assistance programs will lead to increased homelessness and a cascade of negative outcomes, both for the affected individuals and the States. Especially in markets where immigrants are more often employed in lower-paying jobs, housing, without assistance, will quickly become unsustainable and more people will

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become homeless, thereby increasing the demand on state sheltering resources and finances. *See supra* at 16–18. Increased homelessness has immediate and irreparable consequences for public health and has proven to have deleterious effects on children's lifetime outcomes. *See supra* at 16–17. Indeed, "[t]he longterm social costs of poor health and education far outweigh the cost of providing rental assistance." Carey Decl. ¶ 13.

Overall, the Final Rule will lead to a state population which is sicker, hungrier, and less able to contribute to the economic vitality of their communities, all of which imposes significant costs for the Plaintiff States.

D. The Balance of Equities and Public Interest Both Favor a Preliminary Injunction

When the government is a party, the final two *Winter* factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "[T]he purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The principal consideration concerns the extent of the "public consequences" attendant to the stay of the Rule. *Ramirez v. United States Immigration and Customs Enf't*, 310 F. Supp. 3d 7, 32 (D.D.C. 2018) (quoting *Winter*, 555 U.S. at 24); *see also Hernandez*, 872 F.3d at 996. Here, the balance of the equities and public interest strongly favor a stay.

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"There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters*, 838 F.3d at 12 (citations and internal quotation marks omitted). The Rule violates the APA, and will have significant, and immediate, consequences across the country (including the Plaintiff States and their residents). It is, without doubt, in the public interest to prevent lawfully-present individuals and families with children from abandoning myriad federal and state health, education, and housing benefits to which they are entitled by law because of fear of future repercussions to their immigration status.

By contrast, preserving the status quo will not harm the defendants, and refraining from enforcing the Final Rule will cost them nothing. *See Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (court may waive Rule 65(c) bond requirement). Indeed, the Plaintiff States merely seek to keep in place regulations which have governed for the past 23 years. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018) (denying the government's motions to stay district court's TRO, reasoning, in part, that the TRO merely "restored the law to what it had been for many years prior").

Thus, the final two *Winter* factors weigh heavily in favor of the interim equitable relief sought by the Plaintiff States.

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IV. CONCLUSION

For the all the reasons above, the Plaintiff States respectfully request that the Court stay the Rule pending a final adjudication of their claims on the merits or, in the alternative, preliminarily enjoin Defendants from enforcing or implementing the Rule.

RESPECTFULLY SUBMITTED this 6th day of September, 2019.

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Exhibit DDD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES (ARCHDIOCESE OF NEW YORK), and CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs,

- against -

KEN CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services; UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; KEVIN K. McALEENAN, in his official capacity as Acting Secretary of Homeland Security; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

COMPLAINT

Plaintiffs Make the Road New York ("MRNY"), African Services Committee ("ASC"), Asian American Federation ("AAF"), Catholic Charities Community Services (Archdiocese of New York) ("CCCS-NY"), and Catholic Legal Immigration Network, Inc. ("CLINIC"), for their Complaint against defendants Ken Cuccinelli and Kevin K. McAleenan, in their respective official capacities; the United States Citizenship and Immigration Services ("USCIS"); and the United States Department of Homeland Security ("DHS"), allege as follows:

PRELIMINARY STATEMENT

1. Defendants have promulgated a rule (the "Rule")[1] that seeks to deny lawful permanent residence in the United States to millions of law-abiding aspiring immigrants with low incomes and limited assets. Most of them are the husbands and wives, parents and

[1] *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

children of U.S. citizens. For the first time in history, the Rule would impose a wealth test on the primary doorway to U.S. citizenship for immigrants.

2. The Rule purports to implement a narrow provision of the Immigration and Nationality Act (the "INA") that bars admission and lawful permanent residence ("LPR," or so-called "green card" status) to any noncitizen who immigration officials conclude is "likely to become a public charge." For more than a century, courts and administrative agencies have recognized that this provision applies only to noncitizens who are destitute and unable to work, and who are thus likely to be predominantly reliant on government aid for subsistence. In that time, Congress has repeatedly re-enacted the public charge provisions of the Act without material change. And it has expressly rejected efforts to broaden its scope.

3. Defendants now seek through the Rule to redefine "public charge" to dramatically expand the government's power to exclude noncitizens and deny them green cards. Under the Rule, green card status—for the vast majority of immigrants, a necessary condition to achieving citizenship—would be denied to certain, predominantly nonwhite, noncitizens who USCIS loosely predicts are likely to receive even a small amount of specified government benefits at any time in the future. Even the predicted receipt of noncash benefits (such as Medicaid and the Supplemental Nutrition Assistance Program ("SNAP," the former food stamp program)) that are widely used by working families to supplement their earnings—and that, under existing law, are expressly excluded from public charge consideration—would render applicants ineligible for a green card. The Rule would fundamentally transform American immigration law—and, indeed, foundational principles of American democracy—by conditioning lawful permanent residence on high incomes and a perceived ability to

accumulate enough wealth to fully absorb the prospective impacts of health problems or wage losses.

4. The Rule, entitled "Inadmissibility on Public Charge Grounds" and set to become effective on October 15, 2019, threatens grave, imminent harm to immigrants, their families, and their communities, and to immigrant assistance organizations such as plaintiffs here. The nonpartisan Migration Policy Institute has estimated that more than half of all family-based green card applicants could not meet the factor the Rule weights most heavily in favor of an immigrant's adjustment of status, an income of 250 percent of the Federal Poverty Guidelines ("FPG").[2] The Migration Policy Institute has also estimated that 69 percent of recent green card recipients had one or more factors that the Rule weights negatively, and 43 percent had two or more negative factors.[3] As defendants intend, the impact of the Rule would be felt disproportionately by immigrants from countries with predominantly nonwhite populations, including those from Mexico, Central America, the Caribbean, China, the Philippines, and Africa.

5. The harm the Rule will cause is not limited to future denials of green card status. Far from it. As defendants concede—and intend—the Rule will also likely cause hundreds of thousands of immigrants annually not to access benefits to which they are lawfully entitled. Since press reports surfaced in January 2017 of a draft Executive Order directing DHS to adopt a broadened definition of "public charge," large numbers of noncitizens have

[2] Jeanne Batalova et al., *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, Migration Policy Institute (Aug. 2018), https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule. This study was referenced in numerous public comments, including, *e.g.*, those submitted by the National Hispanic Leadership Agenda, and the Service Employees International Union.

[3] Randy Capps et al., *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, Migration Policy Institute (Nov. 2018), https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration. This study was referenced in numerous public comments, including, *e.g.*, those submitted by the National Center for Law and Economic Justice, and the Massachusetts Attorney General.

already chosen not to participate in public benefit programs for fear of damaging their immigration status. DHS has also acknowledged that the losses of benefits resulting from the Rule could lead to "[w]orse health outcomes," "[i]ncreased use of emergency rooms and urgent care as a method of primary health care due to delayed treatment"; "[i]ncreased prevalence of communicable diseases"; "[i]ncreased rates of poverty and housing instability"; and "[r]educed productivity and educational attainment," among other dire harms.[4] In fact, numerous studies cited in public comments on the proposed Rule have shown that DHS's estimates drastically understate the harm the Rule will cause.[5]

6. Nothing in the INA justifies or authorizes the Rule. On the contrary, the Rule is inconsistent with the language of the Act and with more than a century of judicial precedent and administrative practice. As DHS has admitted, "[a] series of administrative decisions after passage of the [INA] clarified . . . that receipt of welfare would not, alone, lead to a finding of likelihood of becoming a public charge." 83 Fed. Reg. at 51,125. Consistent with these decisions and the settled meaning of "public charge," USCIS's predecessor agency, the Immigration and Naturalization Service ("INS"), determined in 1999 that "mere receipt of public assistance, by itself, will not lead to a public charge finding."[6] INS's 1999 published field guidance (the "Field Guidance"), which has been in effect for more than 20 years, expressly excluded from public charge consideration receipt of such supplemental noncash benefits as Medicaid and SNAP, thus permitting intending immigrants who were not primarily

[4] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,270 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

[5] *E.g.*, California Immigrant Policy Center, Comment, at 3 (Dec. 10, 2018). Throughout this Complaint, public comments on the proposed Rule will be cited by referring to the name of the organization or individual that submitted them.

[6] Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237).

dependent on cash assistance to obtain crucial health or other services for themselves and their families without losing eligibility for green cards.[7]

7. The Rule overturns this historical understanding. It seeks to label as "public charges" a far larger group of intending immigrants, including noncitizens who receive any amount of cash or noncash public benefits for even a short duration. Thus, a noncitizen could be branded likely to be a public charge for receiving benefits such as Medicaid, SNAP, and public housing subsidies that are widely used by low-wage workers and are available to beneficiaries with earned income well above the poverty line. Receipt of such benefits would not have been considered in any public charge determination under existing law, including the Field Guidance. And, because determining whether someone is "likely to become a public charge" is inherently predictive, the Rule would bar green card status to any noncitizen whom USCIS agents predict is likely to receive even a minimal amount of such benefits at any time in the future. Under the Rule, green card status could also be denied on the ground that an applicant has limited assets and works at a job that is low-wage or does not provide health insurance. The Rule would also predicate a "public charge" finding on a wide variety of other factors that have never previously been considered relevant, including such vague and standardless (and non-statutory) factors as English fluency and credit score.

8. The Rule thus attempts to rewrite the INA without action by Congress, and it does so in a way that Congress has expressly and repeatedly rejected. Between 1996 and 2013, Congress rejected multiple efforts to define "public charge" to include the receipt of

[7] *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

noncash supplemental benefits. On the contrary, Congress has repeatedly reenacted the public charge provisions of the INA without material change.

9. Defendants fully understand and intend the dramatic change the Rule will make to U.S. immigration law. Stephen Miller, the President's senior advisor on immigration and a principal architect of the Rule, has said that the Rule will be "transformative," and defendant Ken Cuccinelli, in announcing the publication of the Rule, stated that it would "reshape" the system of obtaining lawful permanent residence. They are right. But under the Constitution, it is up to Congress, not the Department of Homeland Security, to "transform[]" or "reshape" U.S. law.

10. The Rule also is "transformative" in that it undermines the goal of family unity, which has been a cornerstone of U.S. immigration policy for nearly a century. Beginning in 1921, Congress expanded the categories of family members of citizens and green card holders able to seek admission or status adjustment through their relatives to further the "well-established policy of maintaining family unity." Revision of Immigration and Nationality Laws, S. Rep. No. 1137, at 16 (1952). The Immigration Act of 1965, also called the Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911, adopted an immigration policy designed to "first reunite families," H.R. Rep. No. 89-745, at 12 (1965).[8] Congress has never retreated from that policy. The Rule will predominantly affect family-based aspiring immigrants, and thus will undermine decades of immigration law promoting and protecting family stability, unity, and well-being through the process of granting lawful permanent residence.

[8] *See* Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. Rev. 1, 4 (2014).

11. The Rule seeks to achieve by fiat what the Trump Administration has failed to achieve through legislation. The Trump Administration explicitly sought to reduce family-based immigration and convert U.S. immigration policy to a "merit"-based system. But its efforts to achieve that goal through legislation have failed. The Rule now seeks to circumvent Congress in furtherance of that goal.

12. The Rule accordingly violates the Administrative Procedure Act ("APA") because it is not in accordance with law, and is arbitrary, capricious, and an abuse of discretion.

13. Even more fundamentally, under the plain language of the INA, DHS issued the Rule without statutory authority. The INA expressly grants the authority to regulate public charge determinations for noncitizens seeking adjustment of status not to DHS, but to the Attorney General. Accordingly, the promulgation of the Rule was enacted "in excess of statutory jurisdiction, authority, or limitations," in further violation of the APA. 5 U.S.C. § 706(2)(C).

14. The Rule violates the APA for additional reasons. Defendants fail to address substantive objections raised in the more than 266,000 public comments—the vast majority of them opposing the proposed rule—from state and local governments, health care providers, educators, religious organizations, members of Congress, business organizations, independent policy analysts, and others. Defendants fail to establish the premise of the Rule that certain arbitrary and in some cases undefined circumstances, such as the minimal receipt of temporary benefits or lack of English proficiency, are reliable predictors of becoming a public charge. This premise is disconnected from the reality of the immigrant experience in the United States. Defendants fail to justify DHS's dramatic departure from prior agency

interpretation of the INA, including the Field Guidance. And, while purporting to apply only to green card applications submitted after its effective date, the Rule is impermissibly retroactive, as well as so confusing, broad, and vague, and internally inconsistent that it fails to give applicants notice of conduct to avoid and invites arbitrary decision-making by government officials.

15. The Rule also discriminates against people with disabilities contrary to Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. § 794.

16. Finally, the Rule violates the Constitution because its adoption was driven by unconstitutional animus against nonwhite immigrants. The Rule—which originated in a nativist think tank, and subsequently in a draft Executive Order—reflects the President's and his advisors' longstanding hostility to nonwhite immigrants from what he has referred to as "shithole countries," and whom he has characterized as "animals" who are "infesting" the United States. He has repeatedly referred to immigration from the southern border as an "invasion." Defendant Cuccinelli, the acting USCIS Director and the primary public face of the Administration's defense of the Rule, has for many years similarly referred to entry of undocumented immigrants from Mexico as an "invasion." In a recent televised interview, when asked whether the Rule was consistent with the ethos of the Statue of Liberty's welcoming words to "your tired, your poor, your huddled masses yearning to breathe free," Cuccinelli responded that those words were addressed to "people coming from Europe." Multiple courts, including at least two district courts in this Circuit, have already found it "plausible" that other anti-immigrant actions by the current Administration—including actions undertaken by DHS—were motivated by just such unconstitutional animus.

17. Plaintiffs are national and community-based non-profit organizations that advise, assist, advocate for, and serve hundreds of thousands of low-income noncitizens and their families in New York City and nationwide. The Rule will impede their core missions, and they will be forced to allocate substantial time and resources to respond to the impact the Rule will have on noncitizen families in New York and elsewhere. Accordingly, they bring this action under the APA and the Fifth Amendment to the United States Constitution to enjoin the Rule, declare it unlawful, and set it aside.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as this case arises under the United States Constitution, the APA, 5 U.S.C. § 551 *et seq*., and the INA, 8 U.S.C. § 1101 *et seq*.

19. The publication of the final Rule in the Federal Register, on August 14, 2019, constitutes final agency action within the meaning of 5 U.S.C. § 704.

20. Venue is proper in this district pursuant to 28 U.S.C. § 1391, because the adjudication of family-based adjustment of status applications occurs at the USCIS New York Field Office located at 26 Federal Plaza, New York, New York 10278, which is in this district, and is where MRNY's members, and ASC's and CCCS's clients, would have their adjustment of status applications adjudicated. Venue in this district is also proper because Plaintiffs MRNY, ASC, AAF, and CCCS have offices in this district.

PARTIES

I. Plaintiffs

21. Plaintiff Make the Road New York ("MRNY") is a nonprofit, membership-based community organization with more than 23,000 members residing in New

York City, Long Island and Westchester. Its mission is to build the power of immigrant and working-class communities to achieve dignity and justice. Its work involves four core strategies: Legal and Survival Services, Transformative Education, Community Organizing and Policy Innovation. MRNY regularly creates and disseminates educational and outreach materials and conducts workshops for its members and the public on issues affecting working-class and immigrant communities. MRNY also mobilizes community members to engage in organizing and public-policy advocacy efforts around the organization's priorities.

22. Through its legal, health and education teams, MRNY provides direct services to thousands of immigrant New Yorkers. Among other matters, MRNY's legal team represents thousands of immigrants in removal proceedings or filing affirmative applications for immigration benefits, including individuals seeking adjustment of status. Its health team assists immigrants in accessing health services and navigating the health system as well as advocating for improved access to healthcare for immigrants. And its adult education team focuses on English as a second language, civics, basic adult education, and citizenship classes for immigrant New Yorkers. In 2018 alone, across its five community centers, MRNY provided direct services to over 10,000 individuals (not including their family members who benefited from its services).

23. During the public notice-and-comment period, MRNY submitted to USCIS a detailed comment documenting numerous harms the Rule would inflict on its members and immigrant communities. MRNY's comment demonstrated the Rule's substantial chilling effect on families and individuals entitled to nutritional and health assistance; the risks to public health and children should the Rule take effect; and the economic losses and increased suffering of immigrant communities. MRNY's comment also criticized the Rule's

racist intent and disproportionate impact on Latinx communities; the irrationality of the English-language proficiency requirement; and the incoherence and unlawfulness of the Rule's alteration of the test to determine whether an immigrant is or may become a public charge.

24. MRNY also assisted approximately 300 of its members in submitting comments.

25. The Rule is causing substantial harm to MRNY. MRNY's mission of advocating for the rights of low-income immigrant communities is inseparable from the interests of its members in not being denied admission or adjustment of their immigration status, in receiving vital public benefits, and in maintaining family integrity and unity. Defendants' actions also harm MRNY, and threaten it with ongoing and future harm, by causing the organization to divert resources in response to defendants' actions, including by assisting immigrants who may receive or need to receive public benefits on behalf of themselves and their families in navigating this new, more onerous regulatory framework. MRNY's members and clients who are preparing to file for adjustment of status face the prospect of denial and ultimately removal from the U.S. should the Rule take effect. Since the Rule was proposed, MRNY has held dozens of workshops to address questions and concerns among its members and devoted significant organizational resources to educating, screening and assisting members and other members of the public in responding to the Rule. MRNY's legal team has to divert resources to provide consultations and advice to immigrant New Yorkers who may be impacted under this Rule. In the event that adjustment applications are denied on public charge grounds, MRNY will have to devote resources to representing its members and clients in removal proceedings. Defendants' actions also increase the already

significant fears and needs of New York's immigrant community, impeding MRNY's goals of mobilizing and empowering its constituency.

26. Plaintiff African Services Committee ("ASC") is a non-profit multi-service human rights agency based in the Manhattan neighborhood of Harlem, and dedicated to mobilizing and empowering immigrants, refugees, and asylees from across the African Diaspora, filling gaps in the pathway to achievement of economic self-sufficiency. ASC's departments provide, among other things, housing placement, rental assistance, health screening access to care, and mental health services for hundreds of immigrants, especially those living with and at risk for HIV/AIDS and viral hepatitis; legal representation in immigration proceedings, including those for adjustment of status, providing increasing levels of assistance with legal application fees and emergency financial support to fill one-time needs, from private sources of funding; English language classes for immigrants; food pantry and nutrition services; and development of leadership skills of immigrants through community education and organizing. In seeking to educate and organize the communities it serves, ASC also publishes fact sheets, newsletters, and policy notes, which include updates and information on immigration policies with the potential to impact its clients.

27. During the public notice-and-comment period, ASC submitted to USCIS a detailed comment documenting numerous harms the Rule would inflict on its clients and immigrant communities generally, with a particular focus on the risks to health care access for those with HIV/AIDS.

28. Defendants' actions threaten substantial harm to ASC's ability to accomplish its mission. ASC's clients who are preparing to file for adjustment face the prospect of denial and ultimately removal from the U.S. should the Rule take effect. ASC's

clients are at particular risk because many live with chronic health conditions currently protected under the Americans with Disability Act ("ADA") and lack private health insurance. The Rule reinforces the concept of disability being a public burden, and will adversely affect immigrants with disabilities like many of ASC's clients, who are more likely than non-disabled immigrants to be living on or below the poverty line and utilizing public benefits for survival. For example, people with disabilities often need help with daily activities that are covered by Medicaid, but typically are not covered by private insurance. As another, children whose immigrant parents have disabilities will suffer due to being denied access to programs that provide them shelter and food, even if they were born in the U.S. In the worst-case scenario, children may be forcibly separated from their parents and placed into foster care.

29. The Rule is also affecting ASC's ability to connect clients with the benefits and services they need due to the warranted fear that receiving benefits today will be held against them in the future when they pursue their goals of seeking adjustment of status.

30. Because of the Rule's impact on ASC clients and constituents, among the many legal needs presented by clients, the organization has no choice but to devote significant resources to responding to the Rule. ASC has had to prioritize assisting applicants for adjustment who can file before the Rule's October 15, 2019, effective date, and at the same time counsel staff, community partners, and clients with urgent questions about whether receiving the benefits and services that keep them healthy and secure will undermine their ability to remain permanently in their communities surrounded by their networks of support. The consequences of choosing to forego benefits, especially healthcare and housing assistance, would be detrimental for ASC clients living with chronic health conditions and would derail their efforts to work, pursue education and training, and achieve their goals of success. In the

event that adjustment applications are denied on public charge grounds, ASC will have to devote resources to representing its clients in removal proceedings.

31. Plaintiff Asian American Federation ("AAF") is a non-profit umbrella leadership and organizational development network based in lower Manhattan and Flushing, Queens, with a mission of building the influence and well-being of the pan-Asian American community. AAF represents over 70 community services agencies throughout the northeast who work in health and human services, education, economic development, civic participation, and social justice, and are focused on serving low-income Asian immigrants and their families. In serving these members, AAF provides information and advocacy tools aimed at the low-income constituents of their members and for use by member staff; initiates research and data analysis to assess community needs, improve service delivery, and make policy recommendations; develops research on critical policy issues; raises awareness of problems by engaging with government stakeholders and the media; and provides training and capacity-building support to AAF member agencies.

32. During the public notice-and-comment period, AAF submitted to USCIS a detailed comment documenting numerous harms the Rule would inflict on its clients and immigrant communities generally, with a particular focus on the Rule making it harder for Asian immigrants to adjust and the chilling effect caused by the Rule.

33. Defendants' actions harm AAF in numerous ways. For low-income Asian immigrants, just like others, the Rule represents an emergency that requires immediate, critical decisions be made about pursuing plans to adjust, seeking to preserve the ability to adjust by foregoing public benefits, and dealing with the fallout from foregoing such benefits: immediate, adverse impacts on health, increased hunger, and housing instability. To fulfill its

mission of building the influence and well-being of its constituent communities, AAF has been required to expend resources providing the information, services, and expertise its members need to address this unfolding emergency, and at the same time represent member interests by engaging with government actors, Asian-language media, and the public to help get the word out about the Rule and its impacts, especially in the low-immigrant Asian neighborhoods and communities.

34. Plaintiff Catholic Charities Community Services (Archdiocese of New York) ("CCCS-NY") is a nonprofit organization within the Archdiocese of New York, with program sites and affiliates located throughout New York City and the Lower Hudson Valley. CCCS-NY's mission is to provide high quality human services to New Yorkers of all religions who are in need, especially the most vulnerable: the newcomer, the family in danger of becoming homeless, the hungry child, persons struggling with their mental health and developing youth. CCCS-NY's mission is grounded in the belief in dignity of each person and the building of a just and compassionate society.

35. CCCS-NY has been pursuing this mission since 1949 through a network of programs and services that enable participants to access eviction/homelessness prevention; tenant education and financial literacy training; case management services to help people resolve financial, emotional and family issues; long-term disaster case management services to help hurricane survivors rebuild their homes and lives; emergency food and access to benefits and other resources; immigration legal services; refugee resettlement; English as a second language services; specialized assistance for the blind; after-school and recreational programs for children and youth; dropout prevention and youth employment programs; and supportive housing programs for adults with severe mental illness.

36. CCCS-NY includes a 150-employee Immigrant and Refugee Services Division, which provides legal counsel, deportation defense, and application assistance—including litigation, family unity, asylum support, naturalization, and more—to immigrants; conducts large scale legal services initiatives throughout the Lower Hudson Valley; provides legal orientation, know your rights, and legal defense to unaccompanied children; offers resettlement and orientation support to refugees; provides English as a second language and cultural instruction; and operates three information hotline services, which respond to over 64,000 calls annually. Two of those hotlines are fundamental to the provision of legal services and legal information by New York City and New York State. These are the "ActionNYC Hotline" and the "New Americans Hotline," which answer over 43,000 calls in 18 languages annually and make referrals to social service providers throughout New York State each year. During 2018, the Immigrant and Refugee Services programming directly assisted over 20,000 individuals—children, families, workers—in New York.

37. During the public notice-and-comment period, CCCS-NY submitted to USCIS a comment documenting the harms the Rule would inflict on immigrant communities, including increased suffering for families and children due to immigrants' foregoing food and health care assistance for fear of losing access to immigration status. CCCS-NY's comment also criticized the Rule's unlawful and confusing alteration of the test to determine whether an immigrant is or may become a public charge; the likelihood of arbitrary and discriminatory application of the new standards; and the arbitrary, costly, and inequitable increase in the Rule's public bond requirements.

38. Defendants' actions directly harm CCCS-NY in multiple ways. The Rule threatens CCCS-NY's ability to achieve its core mission of helping to assist vulnerable

immigrants—families, children, long-time residents, workers—establish their footing in the communities they serve, whether through obtaining LPR status to preserve and protect family unity or ensuring that clients who are eligible continue to access critical government services and benefits that support vulnerable families. The Rule also requires CCCS-NY to devote substantial resources to assist its clients in understanding and addressing its impact. Further, CCCS-NY's clients who are preparing to file for adjustment of status face the prospect of denial and ultimately removal from the U.S. should the Rule take effect. In the event that adjustment applications are denied on public charge grounds, CCCS-NY will have to devote resources to representing its clients in removal proceedings.

39. Given the critical role the CCCS-NY hotlines play in the State and City response to public charge, CCCS-NY is on the front line of responding to the impact of the Rule—on New Yorkers who want to adjust to LPR status and their families, and on New Yorkers who are considering giving up SNAP, housing assistance, and essential health care because they do not understand if the Rule applies to them.

40. Plaintiff Catholic Legal Immigration Network, Inc. ("CLINIC") is a national, non-profit training and resource network focused on equipping immigration organizations with the tools necessary to provide comprehensive immigration representation. CLINIC's network includes approximately 370 affiliate immigration programs, which operate over 400 offices in 49 states and the District of Columbia. Its network employs more than 2,300 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year, including aid with applications for adjustment of status. In seeking to further its mission to embrace the Gospel value of welcoming strangers, CLINIC supports its network by hosting in-person trainings on immigration-related matters; conducting

e-learning courses and webinars; publishing newsletters, Practice Advisories, and articles on developments in the immigration landscape; and, in some instances, providing funding for affiliates working directly with immigrant communities.

41. CLINIC affiliates employ not only attorneys but also Department of Justice ("DOJ")-accredited representatives. Accredited representatives are non-attorney staff or volunteers who are approved by DOJ to represent noncitizens in immigration court or before the Board of Immigration Appeals or USCIS. An accredited representative must work for a non-profit or social service organization that provides low- or no-cost immigration legal services. Many CLINIC affiliates rely on accredited representatives for the day-to-day work of their organization. In turn, those accredited representatives rely on CLINIC's resources for training and guidance.

42. CLINIC also provides training to its affiliates and other providers of services to immigrants. Trainings take the form of webinars, online courses with multiple classes, online self-directed courses, and workshops during its annual affiliate convening. CLINIC also provides technical support to its affiliates through the "Ask-the-Experts" portal on its website.

43. During the public notice-and-comment period, CLINIC submitted to USCIS a detailed comment documenting the enormous harms and burdens the Rule would inflict on immigrant communities and legal representatives and pointing out significant legal and practical flaws in the Rule's scheme. These flaws included, among others, the Rule's failure to justify changes to longstanding practice; its bypassing of the legislative process; and its inconsistency with congressional intent and the plain meaning of "public charge."

44. Defendants' actions threaten to impede CLINIC's mission, and have directly harmed and threaten ongoing and future harm to CLINIC, including by expending substantial resources to address the Rule and its impacts. Attorneys and accredited representatives from affiliates submit inquiries regarding individual immigration matters that are particularly complex, and CLINIC staff provide an expert consultation. Prior to the Rule being published on August 14, 2019, CLINIC attorneys provided an average of ten consultations a week on public charge related issues. Since the Rule was released, CLINIC has experienced a tripling in volume of technical support questions related to public charge and has had to prioritize updating its legal reference materials, conducting webinars, and modifying its training curricula. CLINIC anticipates that demand for consultations will be that much greater when the Rule becomes effective on October 15, 2019. Consultations regarding removal defense for individuals whose adjustment of status applications have been denied will be particularly complex.

45. CLINIC has no choice to apply its resources to addressing the emergencies precipitated by the Rule, both advising on individual cases brought to them by affiliates, and getting accurate information out to their immense network.

46. Were the Rule enjoined and set aside, plaintiffs could proceed with furthering their missions of affirmatively helping immigrants in meeting their goals instead of being forced into the defensive posture of protecting them from adverse actions, dealing with emergencies, and filling in the gaps created by a disenrollment from government benefits and services. Accordingly, the injuries to plaintiffs would be redressed by a favorable decision from this Court. Such a decision would, among other things, allow the organizational plaintiffs to redirect their resources from this issue to their other core objectives.

II. Defendants

47. Defendant Ken Cuccinelli is the Acting Director of United States Citizenship & Immigration Services, the component of DHS that oversees most adjustments and that is responsible for promulgating the Rule. President Trump appointed him to this role in June 2019 without seeking Senate confirmation, after the abrupt forced resignation of his predecessor, Lee Francis Cissna. Defendant Cuccinelli is sued in his official capacity.

48. Defendant Kevin K. McAleenan (the "Acting Secretary") is the Acting Secretary of Homeland Security and Commissioner of U.S. Customs and Border Protection. He inherited the role of Acting Secretary in April 2019 after the forced resignation of his predecessor, Kirstjen Nielsen. He is sued in his official capacity.

49. Defendant DHS is a cabinet department of the United States federal government. DHS has statutory responsibility for, among other things, administration and enforcement of certain portions of the INA (although, as discussed below, not the provisions by which the Rule is purportedly authorized).

50. Defendant USCIS is the agency with DHS responsible for the administration of applications within the United States for immigrant and non-immigrant benefits, including adjudication of applications for legal permanent residence.

FACTUAL ALLEGATIONS

51. The factual allegations in this Complaint are set forth in nine Sections. Section I describes lawful permanent residence (green card or "LPR") status, the basis for family-based adjustment, and the process an applicant for adjustment follows to obtain status under current law, including the public charge provisions of the INA. Section II discusses the historical interpretation of "public charge" in our immigration laws, including Congress's

repeated rejections of efforts to expand the definition of "public charge" in a manner substantially similar to that reflected in the Rule. Section III describes the Rule. Section IV describes the supplemental, noncash public benefits whose receipt would render a person a public charge under the Rule. Section V describes the ways the Rule violates the Administrative Procedure Act, including that the Rule is unlawfully retroactive, arbitrary and capricious, and discriminatory against individuals with disabilities. Section VI explains DHS's lack of statutory authority to promulgate the Rule. Section VII details defendants' failure to follow the APA's procedural requirements in promulgating the Rule, including their failure to meaningfully respond to substantive comments. Section VIII details the extensive evidence of anti-immigrant animus displayed by the defendants and the Trump Administration, under whose instructions DHS crafted and promulgated the Rule. Finally, Section IX discusses the immediate and irreparable harm that the Rule will cause.

I. LPR Status, the Adjustment Process, and the Public Charge Provision of the INA

52. The INA defines "lawfully admitted for permanent residence" to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . . ." 8 U.S.C. § 1101(a)(20). An LPR, or green card holder, has permission to live and work in the U.S. permanently as long as they abide by the law, and the right to petition for certain family members to join them in the U.S. as LPRs. LPR status is also a precondition for most immigrants to be eligible for obtaining U.S. citizenship through naturalization. The INA refers to the process whereby a noncitizen already residing in the United States obtains legal permanent residence as adjustment of status.

53. There are various paths by which an intending immigrant can obtain LPR status. Family-based immigration is the predominant path, accounting for 66 percent of all adjustments to LPR status.[9] Other paths to LPR status include (among others) humanitarian entry provided to refugees, asylees, and certain crime victims; employer sponsorship; and the diversity visa lottery.

54. Obtaining LPR status through a family member involves a number of preconditions and steps. As an initial matter, a person must have a qualifying relationship with certain U.S. citizens or LPRs. One category of qualifying relationships is "immediate relative," meaning a spouse of a U.S. citizen; an unmarried child under the age of 21 of a U.S. citizen; or the parent of a U.S. citizen who is at least 21 years old. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1151(f). The INA places annual numerical limits on the number of immigrant visas available to relatives of U.S. citizens and LPRs in certain categories, but there are no such limits on the number of persons seeking to obtain LPR status through an immediate relative. *Id*. § 1151(b). Other relatives of a U.S. citizen or LPR may qualify under "family-based preference" categories. *Id.* § 1153(a). These include unmarried adult children of citizens; spouses and unmarried children of LPRs; married children of citizens; and brothers and sisters of citizens, but there are annual numerical limits placed on the immigrant visas available in each of these family-based preference categories. *Id.* § 1151(a)(1). Fiancés of a U.S. citizen and a fiancé's child, as well as a widow or widower of a U.S. citizen, may also be eligible to adjust their status to LPR. Most family-based applicants for LPR status are required

[9] *See* Dep't of Homeland Security, *Annual Flow Report: Lawful Permanent Residents*, at 5 (2018), https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf.

to have a financial sponsor who can support them at or above 125 percent of the FPG. *See id.* at § 1183a.

55. Section 212 of the INA lists many of the bases for denying applications for admission and adjustment. *Id.* § 1182(a)(1)–(10) (including, *e.g.*, grounds related to health, criminal convictions, national security, and public charge). If the applicant is found to be eligible and there is no basis for denial, the application for status adjustment is approved and the applicant is issued a lawful permanent resident card, known as a green card.

56. In the context of admissibility and status adjustment, public charge determinations are governed by section 212(a)(4) of the INA, which states that a noncitizen who "in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." *Id.* § 1182(a)(4)(A).

57. The INA identifies five factors that a consular officer or the Attorney General must consider when making a prospective public charge determination in the admissibility context: (1) age, (2) health, (3) family status, (4) assets, resources, and financial status, and (5) education and skills. *Id.* § 1182(a)(4)(B)(i). The statute does not ascribe particular weight to any one factor. The INA also permits a consular officer or the Attorney General to "consider any affidavit of support" from a financial sponsor. 8 U.S.C. § 1182(a)(4)(B)(ii).

58. A separate provision of the INA, not directly at issue here, provides that a public charge determination may result in a noncitizen being deported. Section 237(a)(5) of the INA provides that "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."

Id. § 1227(a)(5). Although the Rule at issue in this litigation purports to apply only to Section 212(a)(4), relating to admission and status adjustment, recent reports indicate that the Department of Justice is developing a public charge deportation rule "based on" the DHS Rule at issue here,[10] and DHS confirms as much in the final Rule.[11]

II. The Public Charge Provisions Have Historically Been Interpreted to Apply Only to Noncitizens Primarily Dependent on The Government For Subsistence

59. Since the "public charge" inadmissibility provision first became part of federal immigration law in 1882, courts and administrative agencies have interpreted the term "public charge" to refer to noncitizens who rely primarily on the government for subsistence, and Congress has repeatedly considered and rejected efforts to expand the definition of public charge in a manner similar to the definition in the Rule. The historical interpretation of "public charge," from its origins in federal immigration law to the present, is described chronologically below.

A. 1880s–1930s: The Original Meaning of "Public Charge" Referred to A Narrow Class of Persons Wholly Unable to Care for Themselves

60. The term "public charge" first appeared in federal immigration law in the Immigration Act of 1882, 47th Cong. ch. 376, 22 Stat. 214, § 2, which provided that "any person unable to take care of himself or herself without becoming a public charge" could be denied admission to the United States. Later bills changed the wording of the clause to "likely to become a public charge," and that language has been retained in the statute to the present.[12]

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[10] *See* Yaganeh Torbati, *Exclusive: Trump Administration Proposal Would Make It Easier to Deport Immigrants Who Use Public Benefits*, Reuters (May 3, 2019), https://www.reuters.com/article/us-usa-immigration-benefits-exclusive/exclusive-trump-administration-proposal-would-make-it-easier-to-deport-immigrants-who-use-public-benefits-idUSKCN1S91UR.

[11] *E.g.*, 84 Fed. Reg. at 41,324.

[12] *E.g.*, 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 § 1; Immigration Act of 1903, 57th Cong. ch. 1012, 32 Stat. 1213, 1214 § 2 (excluding from the United States "persons likely to become a public charge," among others); Immigration Act of 1917, 64th Cong. Ch. 29, 39 Stat. 874, 876 (same); Immigration and

61. In the Immigration Act of 1891, Congress provided additionally that newly arrived immigrants were subject to "removal," or deportation, if they became public charges within one year after entry resulting from circumstances that did not predate arrival (a period later extended to five years). 26 Stat. 1084, 1086 § 11. Like the public charge inadmissibility provision, the public charge removal provision has remained largely unchanged since it was first adopted.[13]

62. While the 1882 Act and its successors did not define the term "public charge," Congress considered the phrase to refer to those who were likely to become long-term residents of "poor-houses and alms-houses"—*i.e.*, persons who were institutionalized and wholly dependent on the government for subsistence. 13 Cong. Rec. 5109 (June 19, 1882). In the House debate on the bill that became the 1882 Act, one supporter argued that the bill was needed to address alleged efforts by foreign nations "to get these paupers into the United States and make their support a burden upon the United States. . . . Here they become at once a public charge. They get into our poor-houses." 13 Cong. Rec. 5107, 5109 (1882) (statement of Mr. Van Voorhis). The same Representative favorably quoted a writer who stated that "America has come to be regarded by European economists as a cheaper poor-house and jail than any to be found at home." *Id.* at 5108–09.

63. This interpretation of "public charge" is consistent with earlier and contemporaneous usage. Contemporary dictionaries defined "charge" as one "committed to another's custody, care, concern, or management." *Century Dictionary of the English*

Nationality Act of 1952, 82nd Cong. ch. 477, 66 Stat. 163, 183 (1952) (excluding noncitizens "who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges").

[13] *See* Immigration Act of 1903, 32 Stat. 1213, 1218 § 20; Immigration Act of 1990, Pub. L. 101-649 § 602, 104 Stat. 4978 ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.").

Language (1889–91). Consistent with this definition (as one group of immigration historians stated in a comment on the Rule), "under the colonial, state, and early federal immigration laws, deportation based on the public charge clause applied only to people accommodated at public charitable institutions or who were substantially dependent on public relief for the basic maintenance of their lives."[14] The 1882 Act itself derived from earlier state statutes regulating admission of immigrants, particularly in New York and Massachusetts, which similarly used the term "public charge" to refer to residents of public institutions for the destitute, such as almshouses and workhouses.[15]

64. Early judicial interpretations of the original public charge provisions confirmed that Congress did not intend the public charge exclusion to apply broadly to noncitizens who relied on any outside assistance, however minimal. On the contrary, the courts recognized early that Congress intended the term public charge to require a substantial level of lengthy or permanent dependence on the public for subsistence. As the Second Circuit held in 1917, "We are convinced that Congress meant [by public charge] to exclude persons who were likely to become occupants of almshouses for want of means to support themselves in the future." *Howe* v. *United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917); *see also Gegiow* v. *Uhl*, 239 U.S. 3, 9-10 (1915) (holding that the list of excludable immigrants in the Immigration Act of 1907, including those likely to become a public charge, meant to exclude immigrants "on the ground of ***permanent*** personal objections accompanying them," (emphasis added), and stating that a group of immigrants could not be excluded on public charge grounds based on "the amount of money possessed and ignorance of our language").

[14] Torrie Hester et al., Comment, at 3 (Oct. 5, 2018) [hereinafter "Historians' Comment"].
[15] *See* Hidetaka Hirota, *Expelling the Poor* 180–204 (2017).

65. Consistent with this narrow understanding of public charge, federal immigration officials in the early 20th century excluded only a minuscule percentage of arriving immigrants on public charge grounds. According to DHS's own data, of the approximately 21.8 million immigrants admitted to the United States as lawful permanent residents between 1892 and 1930, approximately 205,000—less than one percent—were deemed inadmissible as likely to become public charges. The same has been true in subsequent years: between 1931 and 1980 (the last year for which DHS publishes such data), only 13,798 immigrants were excluded on public charge grounds out of more than 11 million immigrants admitted as legal permanent residents—an exclusion rate of approximately one-tenth of one percent.[16]

66. The narrow scope of the term "public charge" as interpreted by these courts and administrative agencies in applying the public charge exclusion provision of the INA is consistent with contemporaneous use of the term by courts in other contexts. Contemporaneous state court decisions expressly distinguished between receipt of "temporary relief" and becoming a public charge. *See*, *e.g.*, *Davies v. State ex rel. Boyles*, 27 Ohio C.C. 593, 595–96, 1905 WL 629, at *2 (Ohio Cir. Ct. July 8, 1905) ("[P]ublic interests are subserved by the aiding of persons who might become a public charge, if left to their own resources, to such an extent that, by combining the small fund given them by the state with what they may be able to earn . . . they might be able to maintain themselves and avoid

[16] *See* Dep't of Homeland Security, *Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016*, (Dec. 18, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2016/table1; Immigration and Naturalization Service, *2001 Statistical Yearbook of the Immigration and Naturalization Service* 258 (2003), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2001.pdf; *see also* Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 18 (2004). Similarly, during the Great Depression, the Immigration and Naturalization Service ("INS") (the predecessor agency to USCIS) did not consider immigrants who were "victims of the general economic depression" deportable simply because they received public relief. *Id.* at 72.

becoming a charge."); *Yeatman v. King*, 51 N.W. 721, 723 (1892) (emphasizing the "obligation" on the public "to keep a portion of the population destitute of means and credit from becoming a public charge by affording them temporary relief").

B. 1940s–1980s: Administrative Decisions Affirm the Original Understanding of Public Charge

67. The original interpretation of "public charge" by Congress and the courts persisted in the mid-twentieth century, largely through decisions of the Board of Immigration Appeals (the "BIA") and the Attorney General, which narrowly limited the circumstances in which an immigrant could be deported or denied admissibility or adjustment of status on public charge grounds.

68. In the leading case of *Matter of B-*, 3 I. & N. Dec. 323, 324 (B.I.A. 1948), the BIA held that "acceptance by an alien of services provided by a State . . . to its residents, services for which no specific charge is made, does not in and of itself make the alien a public charge." Rather, the Board held, a noncitizen was removable as a public charge *only* if (1) the noncitizen was "charged" for receipt of a public benefit under the law, (2) a demand for payment was made, and (3) the noncitizen or a family member failed to pay. *Id.* at 326. *Matter of B-* has remained the law for more than seventy years.

69. In 1952, four years after *Matter of B-* was decided, Congress reenacted the public charge provision in the Immigration and Nationality Act of 1952 (the "1952 Act," also known as the McCarran-Walter Act). The Senate report accompanying the bill that became the 1952 Act carefully traced the administrative and court decisions interpreting the public charge provisions of the Act, and proposed retaining the existing provisions without defining the term "public charge." S. Rep. No. 1515, at 348–49 (1950). Consistent with that recommendation,

the 1952 Act did not define the term or purport to change existing administrative interpretations. *See* 1952 Act, 66 Stat. 163, 183.

70. The holding in *Matter of B-* that mere receipt of public benefits does not render a person a public charge has been applied in the context of admissibility as well as removal. In *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (B.I.A. 1962; A.G. 1964), Attorney General Robert F. Kennedy set forth in detail the history of the public charge inadmissibility rule—including its "extensive judicial interpretation"—and explained that, in order to exclude a noncitizen as likely to become a public charge, "the [INA] requires more than a showing of a possibility that the alien will require public support." *Id.* at 421–22. Instead, the Attorney General explained:

> [s]ome specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.

Id. at 422 (collecting cases); *see also Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."); *Matter of Harutunian*, 14 I. & N. Dec. 583, 590 (1974) (finding that a 70-year old noncitizen who was reliant on state old age assistance was inadmissible on public charge grounds where she "lacks means of supporting herself, . . . has no one responsible for her support and . . . expects to be dependent for support on old age assistance. . . .").

71. These administrative decisions continue to reflect a narrow definition of "public charge" despite the increasingly broad array of public benefits that became available for low-income people since the 1882 Immigration Act was enacted, including the Aid to

Dependent Children program (1935), public housing (1937), food stamps (1964), Medicaid (1965), Supplemental Security Income (1972), and Section 8 housing vouchers (1974). Indeed, even prior to the New Deal—throughout the nineteenth and early twentieth centuries—states, counties, and municipalities routinely provided temporary assistance to needy residents.[17] And prior to enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, discussed further below, many lawfully residing noncitizens were eligible for most federal public benefits without restriction. Plaintiffs are not aware of any judicial or administrative decision holding that the receipt of benefits under any of these programs rendered the recipient a public charge for immigration purposes, and defendants have cited none.

C. 1990s: PRWORA and IIRIRA Confirm Noncitizen Eligibility for Public Benefits and Leave Existing Law Regarding Public Charge Determinations Unchanged

72. Congress in the 1990s twice reenacted the public charge provisions of the INA without material change. First, the Immigration Act of 1990 reenacted the public charge provision virtually unchanged from the 1952 Act. The legislative history to the 1990 Act recognized that something more than mere receipt of benefits was required to label an immigrant as a public charge. A 1988 House Report explained that courts associated the likelihood of becoming a public charge with "destitution coupled with an inability to work," and noted the Supreme Court's finding in 1915 that a person deemed likely to become a public charge "is one whose anticipated dependence on public aid is primarily due to poverty and to

[17] *See* Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 37–59 (10th ed. 1996).

physical or mental afflictions."[18] In the debate leading to enactment of the 1990 Act, one Congressman characterized someone who "would become a public charge" as a person "who gets here who is helpless."[19] The 1990 Act also amended the INA to remove some of its archaic provisions related to the disabled, such as exclusions based on "mental retard[ation]," "insanity," "psychopathic personality," "sexual deviation," or "mental defect."[20]

73. In 1996, Congress enacted two major pieces of legislation focused on the eligibility of noncitizen immigrants for certain public benefits and on public charge determinations: the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA," colloquially called the "Welfare Reform Act") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Neither statute purported to redefine "public charge," or to alter the settled rule that the mere receipt of means-tested benefits is not a basis for branding someone a public charge.

74. PRWORA restricted certain noncitizens' eligibility for certain federal benefits. Pub. L. 104-193, § 403, 110 Stat. 2105, 2265–67 (1996). Some noncitizens were completely excluded from eligibility. But following the passage of PRWORA and subsequent legislation, certain classes of immigrants remained eligible to receive federally-funded government benefits, including Medicaid, Food Stamps (now SNAP), Supplemental Security Income ("SSI") and Temporary Assistance for Needy Families ("TANF," a form of cash assistance), the Children's Health Insurance Program ("CHIP"), and the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"). *See generally* 8 U.S.C.

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[18] Staff of the H. Comm. on the Judiciary, 100th Cong., Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis 121 (Comm. Print 1988) (citing *Gegiow v. Uhl*, 239 U.S. 3 (1915)).

[19] 135 Cong. Rec. S14,291 (July 12, 1989) (statement of Mr. Simpson).

[20] Immigration Act of 1990, Pub. L. No. 101-649, §§ 601-603, 104 Stat. 4978, 5067–85 (1990).

§§ 1612–1613. PRWORA also authorized states to choose to cover a broader group of noncitizens for eligibility in state public benefits programs. *Id.* § 1621(d).[21]

75. Contrary to DHS's suggestion, nothing in PRWORA supports the Rule's unprecedented definition of public charge as someone who receives a minimal amount of public benefits. While PRWORA's statement of purpose expressed the policy that resident noncitizens "not depend on public resources to meet their needs," 84 Fed. Reg. at 41,294, Congress plainly concluded that that policy was consistent with affirming the eligibility of certain noncitizens for federal public benefits, and authorizing states to provide benefits to a broader group of noncitizens not eligible for federal benefits.[22]

76. Nothing in PRWORA purported to change the meaning of "public charge" or to overturn its longstanding administrative application. Nor was this accidental. On the contrary, PRWORA specifically amended *another* provision of the INA relevant to public charge determinations. Section 423 of PRWORA amended the INA to provide detail about the requirements for executing an affidavit of support, a document executed by sponsors of certain immigrants establishing that the immigrant will not become a public charge. Pub. L. No. 104-193, § 423, 110 Stat. 2105, 2271–74. If Congress had wanted to change the settled

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[21] In legislation following enactment of PRW0RA, Congress expanded the availability of certain benefits, particularly SNAP, to so-called "qualified aliens." *See* Agricultural Research, Education and Extension Act of 1998 ("AREERA"), Pub. L. No. 105-185, 112 Stat. 523 (restoring eligibility for certain elderly, disabled and child immigrants who resided in the United States when PRWORA was enacted); The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (restoring eligibility for food stamps (now SNAP) to qualified aliens who have been in the United States at least five years and immigrants receiving certain disability payments and for children, regardless of how long they have been in the country).

[22] DHS concedes that PRWORA's policy statements about self-sufficiency were not codified in the INA, including in the public charge inadmissibility provision, which makes no mention of "self-sufficiency." *See* 84 Fed. Reg. at 41,355–56 ("although the INA does not mention self-sufficiency in the context of section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), DHS believes that there is a strong connection between the self-sufficiency policy statements [in PRWORA] (even if not codified in the INA itself) at 8 U.S.C. 1601 and the public charge inadmissibility language in section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), which were enacted within a month of each other.").

interpretation of public charge to include receipt of minimal amounts of noncash benefits, it would have been eminently logical for it to do so as part of PRWORA, a law that specifically concerned both the availability of public benefits to noncitizens and the public charge inadmissibility provision of the INA. Congress declined to make that change.

77. IIRIRA—which was passed the month after PRWORA—codified the existing standard for determining whether a noncitizen was inadmissible as a public charge. Pub. L. No. 104-208 § 531, 110 Stat. 3009 (1996) (amending 8 U.S.C. § 1182). IIRIRA re-enacted the existing INA public charge provision relating to admission and status adjustment, and once again chose to leave the term "public charge" undefined. *See* 8 U.S.C. § 1182(a)(4). Instead, the statute provided that, consistent with prior case law, a public charge determination should take account of the "totality of the circumstances," and specified that any public charge determination consider the applicant's age; health; family status; assets, resources, and financial status; and education and skills. *Id.* § 1182(a)(4)(B)(i).

78. IIRIRA also confirmed that immigration officers could consider a binding affidavit of support from an applicant's sponsor in making a public charge determination. *Id.* § 1182(a)(4)(B)(ii); *see id.* § 1183a. In practice, since the enactment of PRWORA and IIRIRA, noncitizens seeking admission or adjustment have routinely been able to overcome a potential public charge determination by filing a binding affidavit of support from a sponsor.[23]

79. Nothing in IIRIRA purported to expand the definition of public charge, or reflected an intent by Congress to use the public charge provision to refuse admission or status adjustment based upon past or likely future receipt of supplemental or noncash public benefits.

[23] *See* Center on Budget and Policy Priorities, Comment, at 30 (Dec. 7, 2018) [hereinafter "CBPP Comment"].

D. 1995–2013: Congress Repeatedly Rejects Efforts to Expand the Meaning of "Public Charge"

80. Congress's decision to maintain the definition of "public charge" was no oversight. On the contrary, Congress has repeatedly considered and rejected proposals to amend the INA public charge provisions to apply to persons receiving (or considered likely to receive) means-tested public benefits—the result that DHS now seeks to achieve through the Rule.

81. In the debate leading up to the enactment of IIRIRA, Congress considered and rejected a proposal to label as a public charge anyone who received certain means-tested public benefits. An early version of the bill that became IIRIRA would have defined the term "public charge" for purposes of removal to include any noncitizen who received certain public benefits enumerated in the bill, including Aid to Families with Dependent Children, Medicaid, food stamps, SSI, and other programs "for which eligibility for benefits is based on need." Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996). The express purpose of this provision was to overturn the settled understanding of "public charge" found in the case law. When the bill was considered by the Senate, Senator Alan Simpson (a proponent of the provision) explained during debate that the purpose of the new public charge definition was to override "a 1948 decision by an administrative law judge"—*Matter of B-*, discussed in ¶¶ 68–70 above—which he argued had rendered the public charge provision "virtually unenforced and unenforceable." *See* 142 Cong. Rec. S4401, S4408–09 (1996).

82. The effort to overturn *Matter of B-* and change the settled definition of public charge was met with criticism. For example, Senator Patrick Leahy expressed concern

that the bill "is too quick to label people as public charges for utilizing the same public assistance that many Americans need to get on their feet." S. Rep. No. 104-249, at 63 (1996). Senator Leahy was "disturbed that the definition of public charge goes too far in including a vast array of programs none of us think of as welfare," including medical services and supplemental nutritional programs and urged that the bill "will yield harsh and idiosyncratic results that no one should intend." *Id*. at 64.

83. The effort to redefine the public charge in IIRIRA failed. Although a version of the bill including the expansive definition of public charge cleared one chamber of Congress, the bill could not be passed until the provision was removed. In a statement on the Senate floor the day IIRIRA was enacted, Senator Jon Kyl, a floor manager of the bill and proponent of the provision, explained:

> [I]n order to ensure passage of this historic immigration measure, important provisions of title 5 have been deleted. . . . [One] provision that was removed from title 5 would have clarified the definition of "public charge." Under the House-passed conference report, an immigrant could be deported—but would not necessarily be deported—if he or she received Federal public benefits for an aggregate of 12 months over a period of 7 years. That provision was dropped during Saturday's negotiations.

142 Cong. Rec. S11872, S11882 (1996) (statement of Sen. Kyl).

84. In 2013, Congress again turned back efforts to redefine public charge to include anyone receiving means-tested public benefits when the Senate debated the proposed Border Security, Economic Opportunity, and Immigration Modernization Act, a bill that sought to create a path to citizenship for noncitizens who could show they were not "likely to become a public charge." S. 744, 113th Cong. § 2101 (2013). During committee deliberations, Senator Jefferson B. Sessions, later to serve as Attorney General during a period of time when the Rule was under consideration and development, sought to amend the

definition of public charge to include receipt of "noncash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program." S. Rep. No. 113-40, at 42 (2013). Senator Sessions' proposed amendment was rejected by voice vote. *Id.*

85. In short, Congress has repeatedly rejected efforts to expand the definition of public charge along the lines now proposed by DHS. In so doing, it has demonstrated its clear intent to continue to apply the historical definition of public charge that has endured for over 100 years. Nowhere in the INA does Congress delegate to DHS, USCIS, or any other executive agency the authority to add new bases of inadmissibility or removability without the consent of Congress.

E. 1999: Administrative Field Guidance Reaffirms the Settled Interpretation of Public Charge

86. In 1999, approximately three years after the passage of PRWORA and IIRIRA (and in the administration of the President Clinton, who signed both bills), the Immigration and Naturalization Service ("INS," the predecessor agency to USCIS) issued its *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* ("Field Guidance"), 64 Fed. Reg. 28,689 (May 26, 1999), and a parallel proposed regulation, 64 Fed. Reg. 28,676 (May 26, 1999). INS issued the Field Guidance and proposed regulation "[a]fter extensive consultation with benefit-granting agencies," 64 Fed. Reg. at 28,692, in response to "growing public confusion" about the definition of public charge in the wake of PRWORA and IIRIRA, *id.* at 28,676, and "to ensure the accurate and uniform application of law and policy in this area," *id.* at. 28,689. INS explained that the Field Guidance "summarize[d] longstanding law with respect to public charge," and provided "new guidance on public charge determinations" in light of the recent legislation. *Id.*

87. The Field Guidance defined "public charge" as a noncitizen "who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'" *Id.* The Field Guidance expressly excluded from public charge determinations consideration of noncash benefits programs, such as Medicare, Medicaid, SNAP, and housing assistance. *Id.* INS explained that "[i]t has never been [INS] policy that any receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge." *Id.* at 28,692.

88. INS explained that the definition of public charge adopted in the Field Guidance and proposed regulation comported with the plain meaning of "charge," as evidenced by dictionary definitions of the term as one "committed or entrusted to the care, custody, management, or support of another."[24] It reasoned that this definition "suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support," and that this standard of primary dependence on public assistance "was the backdrop against which the 'public charge' concept in immigration law developed in the late 1800s." 64 Fed. Reg. at 28,677.

89. INS further concluded that noncash benefit programs should not be considered in public charge determinations because benefits under such programs "are by their nature supplemental and do not, alone or in combination, provide sufficient resources to

[24] 64 Fed. Reg. at 28,677 (quoting Webster's Third New International Dictionary of the English Language 377 (1986) (defining "charge" as "a person or thing committed or entrusted to the care, custody, management, or support of another," and providing as an example: "He entered the poorhouse, becoming a county charge.") and citing 3 Oxford English Dictionary 36 (2d ed. 1989) (defining "charge" as "[t]he duty or responsibility of taking care of (a person or thing); care, custody, superintendence")).

support an individual or family." *Id.* at 28,692. It explained that such benefits "are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient." *Id.* INS also emphasized that it did not expect this definition "to substantially change the number of aliens who will be found deportable or inadmissible as public charges." *Id*. Likewise, USCIS publishes on its website a "public charge fact sheet" that, as of the filing of this Complaint, makes clear that noncash benefits are not subject to public charge consideration.[25]

90. In identifying only primary dependence on means-tested cash assistance as a trigger for the public charge determination, the Field Guidance made expectations clear both to applicants for adjustment and admission and to USCIS officers tasked with implementing it. In the 20 years since the Field Guidance was adopted, the number of noncitizens excluded or denied adjustment as likely to become a public charge has remained small. By the same token, according to statistics from the State Department, between 2000 and 2016, approximately 36,000 noncitizens were denied visas on public charge grounds, less than two-tenths of one percent of the more than 17 million immigrants admitted as lawful permanent residents.[26]

F. Background of The Rule

91. The Rule originated in a wide-ranging policy proposal published in April 2016 by the Center for Immigration Studies ("CIS"), a far-right group founded by white

[25] *See* Public Charge Fact Sheet, https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet (last visited Aug. 24, 2019).

[26] *See* Report of the Visa Office, 2000–2018, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html.

supremacist John Tanton and dedicated to immigration restrictionism.[27] Tanton was a supporter of "passive eugenics"[28] intended to preserve America's white majority, which he feared was under threat due to the "greater reproductive powers" of Hispanic immigrants.[29] He has been quoted as saying, "I have come to the point of view that for European-American society and culture to persist, it requires a European-American majority and a clear one at that."[30]

92. The CIS publication that led to the Rule, "A Pen and a Phone: 79 immigration actions the next president can take," lists numerous proposals for limiting immigration of low-income people and asylum seekers from non-European countries. Action #60 urges the next president to "make use of the public charge doctrine to reduce the number of welfare-dependent foreigners living in the United States."[31] The publication also misleadingly states that "[h]alf of households headed by immigrants use at least one welfare program."[32] This assertion fails to differentiate long-term lawful permanent residents and naturalized citizens from intending immigrants; ignores that most intending immigrants are not eligible for any non-emergency public assistance at all; and misleadingly includes benefits paid to U.S. citizen members of noncitizen-headed households.[33]

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27 *See* Southern Poverty Law Center listing of Center for Immigration Studies as an "anti-immigrant hate group," Southern Poverty Law Center, https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies (last visited Aug. 24, 2019).

28 *See* Anti-Defamation League, *Ties Between Anti-Immigrant Movement and Eugenics*, (Feb. 22, 2013), https://www.adl.org/news/article/ties-between-anti-immigrant-movement-and-eugenics.

29 *See* Matt Schudel, *John Tanton, architect of anti-immigration and English-only efforts, dies at 85*, Wash. Post (July 21, 2019), https://www.washingtonpost.com/local/obituaries/john-tanton-architect-of-anti-immigration-and-english-only-efforts-dies-at-85/2019/07/21/2301f728-aa3f-11e9-86dd-d7f0e60391e9_story.html.

30 *Id.*

31 Center for Immigration Studies, *A Pen and A Phone* 8 (Apr. 6, 2016), https://cis.org/sites/cis.org/files/79-actions_1.pdf.

32 *Id.*

33 *See* Alex Nowrasteh, *Center on Immigration Studies Overstates Immigrant, Non-Citizen, and Native Welfare Use*, Cato Institute (Dec. 6, 2018), https://www.cato.org/blog/center-immigration-studies-overstates-immigrant-

93. Within a week of President Trump's inauguration, a draft of an Executive Order targeting immigrant-headed families that had used any means-tested public benefit, including health insurance for U.S. citizen children, was leaked to the public, initiating a pattern across the country of fear and withdrawal from public services and benefits. The draft Executive Order, among other things, directed DHS to issue new rules defining "public charge" to include any person receiving means-tested public benefits.[34]

94. The draft Executive Order was never signed. But DHS embarked on drafting changes to the public charge criteria through notice-and-comment rulemaking. Early drafts of the proposed rule were leaked to the press in February and March 2018.[35] And on October 10, 2018, DHS published a Notice of Proposed Rulemaking (the "NPRM") entitled "Inadmissibility on Public Charge Grounds" and opened the proposed rule for public notice and comment. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

95. More than 266,000 think tanks, scholars, advocacy groups, legal services organizations, children's aid groups and other non-profits, states, municipalities, and individuals submitted comments, the "vast majority" of which "opposed the Rule," according to DHS. 84 Fed. Reg. at 41,304.

96. On August 14, 2019, USCIS published the final Rule.

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non-citizen-native-welfare-use (criticizing CIS's "unsound methodological choice[s]" that are made to "inflat[e]" the apparent use of public benefits programs by noncitizens so as to justify expanding public charge).

[34] *See* Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility (Jan. 23, 2017), https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7872571/Protecting_Taxpayer_Resources_by_Ensuring_Our_Immigration_Laws_Promote_Accountability_and_Responsibility.0.pdf.

[35] Nick Miroff, *Trump Proposal Would Penalize Immigrants Who Use Tax Credits and Other Benefits*, Wash. Post (Mar. 28, 2018), https://www.washingtonpost.com/world/national-security/trump-proposal-would-penalize-immigrants-who-use-tax-credits-and-other-benefits/2018/03/28/4c6392e0-2924-11e8-bc72-077aa4dab9ef_story.html.

III. Summary of The Rule

97. The Rule seeks to implement the CIS wish list and the draft Executive Order. The Rule brands as a "public charge" anyone who receives any amount of specified means-tested public benefits in any twelve months over a thirty-six month period; it defines the statutory phrase "likely to become a public charge" to include anyone deemed likely to receive such benefits "at any time in the future"; and it provides that receipt of such benefits during the three years preceding the application is a "heavily weighted negative factor" in determining whether an applicant is likely to become a public charge. Other factors, including low income, limited assets, and having a health condition coupled with an absences of private health insurance, also weigh against applicants. The Rule also calls for consideration of such nonstatutory factors as English language proficiency and credit score, and counts both youth and old age against an intending immigrant. The Rule precludes any noncitizen immigrant subject to public charge scrutiny who is deemed likely to receive such benefits at any time in the future—including large numbers of low-income and nonwhite applicants who have never received such benefits—from obtaining legal permanent residence.

98. More specifically, the Rule works as follows.

99. *First*, the Rule defines "public charge" to mean a person "who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501 (proposed 8 C.F.R. § 212.21(a)).

100. *Second*, the Rule defines "public benefit" to mean *any* amount of benefits from any of the programs enumerated in the Rule. 84 Fed. Reg. at 41,501 (proposed 8 C.F.R. § 212.21(b)). The Rule defines "public benefits" to include a wide range of cash and noncash

benefits that offer short-term or supplemental support to eligible recipients. These benefits include cash benefits such as SSI, 42 U.S.C. § 1381 *et seq.*; TANF, 42 U.S.C. § 601 *et seq.*; and "Federal, state or local cash benefit programs for income maintenance"; and noncash supplemental benefits such as SNAP, 7 U.S.C. §§ 2011–2036c; Section 8 Housing Assistance under the Housing Choice Voucher Program, 24 CFR part 984; 42 U.S.C. §§ 1437f and 1437u; Section 8 Project-Based Rental Assistance, 24 C.F.R. parts 5, 402, 880–884, 886; federal Medicaid, 42 U.S.C. §§ 1396 *et seq.* (with certain narrow exclusions)[36]; and Public Housing under section 9 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* 84 Fed. Reg. 41,501 (proposed 8 C.F.R. § 212.21(b)).[37] In contrast, as noted, the Field Guidance considers only primary dependence on cash assistance and long-term institutionalization in making a public charge determination, and specifically excludes from consideration noncash benefits.

101. The definition of "public benefit" in the Rule also radically changes the amount as well as the type of benefits that can trigger a public charge finding. While under the Field Guidance, as noted, only a person who was considered "primarily dependent" on the government for subsistence was deemed a public charge, under the Rule, the receipt of any amount of the listed benefits renders the immigrant an excludable public charge if they are received for the established duration: 12 months "in the aggregate" in the 36-month period prior to filing an application for adjustment. Under this "aggregate" calculus, receipt of two

[36] Medicaid benefits excluded from the public charge analysis include benefits paid for an emergency medical condition, services or benefits provided under the Individuals with Disabilities Education Act, school-based benefits provided to children at or below the eligible age for secondary education, and benefits received by children under 21 years of age, or woman during pregnancy and 60 days post-partum. 84 Fed Reg. at 41,501 (proposed 8 C.F.R. § 212.21(b)(5)).

[37] The definition of "public benefits" excludes benefits received by (i) individuals enlisted in the armed forces as well as their spouses and children, (ii) individuals during a period in which they are exempt from the public charge inadmissibility ground, and (iii) children of U.S. citizens whose admission for lawful permanent residence will automatically result in their acquisition of citizenship. 84 Fed. Reg. at 41,501.

benefits in one month would count as two months. *See* 84 Fed. Reg. at 41,501 (proposed 8 C.F.R. § 212.21(a)).

102. DHS offers no cogent explanation for this twelve-month trigger. Indeed, although DHS received numerous comments that opposed taking into account the receipt of minimal or supplemental benefits in making a public charge determination, the final Rule actually lowers the threshold from what was proposed in the NPRM. The proposed rule in the NPRM would have labeled someone a public charge only if they received any of the listed benefits, such as SNAP, in an amount in excess of fifteen percent of the FPG for a household of one within twelve months—which currently would amount to $1,821 a year. But it did not penalize applicants for receipt of benefits below this already-low threshold. DHS nowhere explains why it considers the appropriate threshold to be 12 months rather than 6, 24, or any other number. Moreover, under the final Rule, USCIS will "consider and give appropriate weight to past receipt of benefits" even below the already low twelve-month threshold. 84 Fed. Reg. at 41,297.

103. The Rule's sweeping definitions of "public charge" and "public benefits" would drastically increase the number of persons potentially deemed a public charge. As an illustration, by one estimate, in any one year, 30 percent of U.S.-born citizens receive one of the benefits included in the proposed definition (compared to approximately 5 percent of U.S.-born citizens who meet the current benefit-related criteria in the public charge determination under the Field Guidance). Similarly, in any given year, 16 percent of U.S. workers receive one of those benefits, compared to one percent who meet the current benefit-related criteria. As set forth in its submission through the public notice-and-comment process, the Center on Budget and Policy Priorities estimates that 40 percent of U.S.-born individuals covered by a

2015 survey participated in one of those programs between 1998 and 2014—a figure that, after adjusting for underreporting, is likely approximately 50 percent.[38] A more recent report by the same organization explains that, "[i]f one considers benefit receipt of the U.S.-born citizens over the 1997-2017 period, some 43 to 52 percent received one of the benefits included in the proposed public charge rule," and that more than 50 percent of the U.S.-born citizen population would receive such benefits over their lifetimes.[39] While U.S. citizens are not subject to the public charge rule, these figures illustrate the extraordinarily broad potential impact of the Rule.

104. DHS does not dispute the accuracy of these estimates. Instead, it dismisses any comparisons to U.S. citizens' benefit use as "immaterial." *See* 84 Fed. Reg. at 41,353 ("it is immaterial whether the definition of 'public charge' in the rule would affect one in twenty U.S. citizens or one in three"). But DHS offers no support for the suggestion that Congress would ever have approved a definition of "public charge" so sweeping that it could be applied to nearly half of U.S. citizens.

105. *Third*, the Rule defines the statutory phrase "likely at any time to become a public charge" to mean "more likely than not at any time in the future to become a public charge, . . . based on the totality of the alien's circumstances." 84 Fed. Reg. at 41,501, (proposed 8 C.F.R. § 212.21(c)). Thus, the Rule expressly disclaims any limit on how far into

[38] *See* CBPP Comment at 2, 7–8, 10; *see also* Center for American Progress, Comment, at 15 (Dec. 10, 2018) ("[T]he proposed redefinition would mean that most native-born, working-class Americans are or have been public charges").

[39] *See* Center on Budget and Policy Priorities, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means a Chance to Come to or Stay in the U.S.* (May 30, 2019), https://www.cbpp.org/research/poverty-and-inequality/trump-administrations-overbroad-public-charge-definition-could-deny.

the future the consideration is to extend or what "totality" of circumstances a government officer is permitted to balance.

106. *Fourth*, the Rule creates a complex and confusing scheme of positive and negative "factors," including certain "heavily weighted" factors, that will be used in determining whether a noncitizen is likely to become a public charge. 84 Fed. Reg. at 41,502–03 (proposed 8 C.F.R. § 212.22).

107. The factors focus overwhelmingly on the noncitizen's income and financial resources. Thus, one of the "heavily weighted negative factors" under the Rule is past or current receipt of public benefits. 84 Fed. Reg. at 41,504 (proposed 8 C.F.R. § 212.22(c)). Another "heavily weighted negative factor" is an applicant's diagnosis with a medical condition that is "likely to require extensive medical treatment" and corresponding lack of private health insurance or financial resources to pay for anticipated medical costs. *Id.*

108. Likewise, every "heavily weighted positive factor" under the Rule similarly focuses on the immigrant's assets and financial resources, such as (1) having income, assets, or resources, and support of at least 250 percent of the FPG, (2) being authorized to work and currently employed with an annual income of at least 250 percent of the FPG, or (3) possessing private health insurance. *Id.* The Rule expressly excludes from consideration as private health insurance any insurance purchased using tax credits for premium support under the Affordable Care Act. *Id.*

109. The factors under the Rule that are not "heavily weighted" also focus predominantly on assets and financial resources. For example, the Rule provides that DHS will consider whether the applicant's household's annual gross income is at least 125 percent of the most recent FPG based on household size. *See* 84 Fed. Reg. at 41502–03 (proposed 8

C.F.R. § 212.22(b)(4)). If the applicant's household's annual gross income is below that level, DHS will consider this a negative factor, unless the total value of the applicant's household assets and resources is at least *five times* the underage. *See id.*[40]

110. Other factors likewise focus on financial resources. DHS states that it will consider whether the applicant has sufficient assets and resources to cover reasonably foreseeable medical costs related to a condition that could require extensive care or interfere with work. Lack of private health insurance or an undefined amount of cash reserves that could cover medical expenses would be a negative factor. 84 Fed. Reg. at 41,503 (proposed 8 C.F.R.§ 212.22(b)(4)(C)); *see also* 83 Fed. Reg. at 51,189.

111. The Rule also penalizes applicants who are under the age of 18—merely because of their age, even though they have their whole working lives ahead of them—as well as those aged 62 and over. *See* 84 Fed. Reg. at 41,502 (proposed 8 C.F.R. § 212.22(b)(1)). Although DHS acknowledges that many commenters pointed out that it is not possible for young people to work to support themselves, the Rule fails to address this point, and instead responds that DHS may not "exempt" such children from the regulation. But choosing not to categorize youth as a negative factor is not the same as providing an "exempt[ion]," and DHS does nothing to address those many comments.

112. The Rule provides further that DHS will consider additional vague and unprecedented factors for which there appears to be no specific standard. For example, for the first time, DHS will evaluate an intending immigrant's English language proficiency, without articulating any standard or level of proficiency an applicant is required to attain or how such

[40] This amount is reduced to three times the underage for an immigrant who is the spouse or child of a U.S. Citizen, and one times the underage for an immigrant who is an orphan who will be adopted in the United States after acquiring permanent residence. *See id.*

proficiency is to be measured. 84 Fed. Reg. at 41,504 (proposed 8 C.F.R. § 212.22(b)(5)(ii)(C)). In contrast, when determining a naturalization applicant's English language proficiency, USCIS's regulation sets out clear standards for ability to read, write, and speak "words in ordinary usage" and directs applicants to test study materials and testing procedures on the USCIS website. *See* 8 C.F.R. § 312.1.

113. Further, the Rule will take into account a noncitizen's U.S. credit score, as assessed by private credit agencies, counting below-average credit scores as a negative factor. 84 Fed. Reg. at 41,503 (proposed 8 C.F.R. § 212.22(b)(4)(ii)(G)). There is no other immigration benefit for which DHS uses credit score—an error-prone measurement, as DHS concedes, *see* 84 Fed. Reg. at 41,427 ("DHS recognizes that the credit reports and scores may be unavailable or inaccurate.")—to determine whether an applicant is entitled to relief.

114. DHS states that it will consider submission of an affidavit of support, but the approach outlined in the Rule departs from past practices by decreasing the impact of a sufficient affidavit of support on a public charge determination. Under the Rule, an affidavit of support will no longer be sufficient to rebut a public charge finding. Rather, it will simply be one positive factor—and not even a heavily weighted one—in the totality of the circumstances test. *See* 84 Fed. Reg. at 41,439. Moreover, DHS will no longer consider an enforceable affidavit of support at face value. Instead, the Rule requires an immigration office to evaluate "the likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the [noncitizen]," by evaluating such non-statutory factors as the sponsor's income and assets, the sponsor's relationship to the applicant, and whether the sponsor has submitted affidavits of support for other individuals. 84 Fed. Reg. at 41,504 (proposed 8 C.F.R. § 212.22(b)(7)).

115. The impact of these factors is to multiply the number of grounds for deeming noncitizens inadmissible as public charges and barred from legal permanent residence. By focusing virtually all the factors DHS chooses to identify—including the majority of "heavily weighted factors"—on an immigrant's assets and resources, the Rule provides immigration officers with an abundance of options to deny green cards to low-income immigrants, whether they have accessed public benefits or not. The income and resources-focused factors are not targeted to determining who is currently or predicted to be primarily dependent on the government for subsistence. Rather, they are geared toward capturing a much broader group of low- and middle-income noncitizens in the public charge dragnet. As discussed above, this approach represents a sharp departure from the consistent historical understanding and application of the public charge inadmissibility rule.

IV. The Public Benefits Targeted by the Rule Provide Temporary and/or Supplemental Support to Individuals Who Work

116. As noted, the Rule defines "public charge" to mean a person who receives certain enumerated public benefits for more than 12 months in any 36-month period. The "public benefits" at the root of the public charge inquiry include, for the first time, noncash benefits, including SNAP, Medicaid, and public housing assistance. As INS recognized in issuing the Field Guidance, these benefits "are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family." 64 Fed. Reg. at 28,692. Contrary to DHS's repeated assertion that an individual who makes use of these benefits "is not self-sufficient," *e.g.*, 84 Fed. Reg. at 41,349, these programs are widely used by working families to supplement their other income. And they are, by design, available to people with incomes well above the poverty line and, in some cases, with significant assets.

A. SNAP

117. Congress created the food stamp program (now known as the Supplemental Nutrition Assistance Program, or "SNAP") in 1964, in order to "safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households."[41] SNAP benefits may be used to buy nutritional staples, like bread, fruits and vegetables, meat, and dairy products.[42] The current maximum monthly allotment of SNAP benefits an individual is eligible for is $192 for an individual, or $504 for a family of three,[43] which amounts to less than $6 per person daily. The average actual allotment for a family of three in 2019 is estimated to be approximately $378 per month, or little more than $4 per person daily.[44]

118. The supplemental nature of SNAP is evident not only from its name, but from the significant number of SNAP recipients who work. Over one-third of non-disabled adults work in ***every*** month they participate in SNAP.[45] And "[j]ust over 80 percent of SNAP households with a non-disabled adult, and 87 percent of households with children and a non-disabled adult, included at least one member who worked either in a typical month while receiving SNAP or within a year of that month."[46] Many SNAP recipients must meet strict

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41 Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified at 7 U.S.C. § 2011); *accord* 7 C.F.R. § 271.1 (reiterating same purpose).

42 *See* N.Y. Office of Temporary & Disability Assistance *Supplemental Nutrition Assistance Program (SNAP): Frequently Asked Questions*, http://otda.ny.gov/programs/snap/qanda.asp#purchase.

43 U.S. Dep't of Agriculture Food & Nutrition Serv., *SNAP Eligibility*, https://www.fns.usda.gov/snap/recipient/eligibility#How much could I receive in SNAP benefits? (providing monthly SNAP benefits by household size, for the period October 1, 2018 through September 30, 2019).

44 *See* Center on Budget and Policy Priorities, *A Quick Guide to SNAP Eligibility and Benefits* at Table 1 (Oct. 16, 2018), https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits, (estimating 2019 averages based on FY 2017 SNAP Quality Control Household Characteristics Data, the "most recent data with this information"); *accord* CBPP Comment at 44 ("SNAP benefits average only about $1.40 per meal, or about $126 per month per person.").

45 CBPP Comment at 44.

46 *Id.* at 43.

work requirements to maintain eligibility.[47] Receipt of SNAP benefits can improve birth outcomes and long-term health, and reduce future reliance on the very public benefits programs whose use DHS claims it seeks to discourage.[48]

119. Although most SNAP recipients are subject to income and resource eligibility requirements, many recipients have significant assets and income above the poverty line. Households with earned income can maintain SNAP eligibility up to 150 percent of the FPG, and households with childcare expenses up to 200 percent. Many significant assets are excluded from SNAP eligibility determinations, including homes of residence, the full or partial value of certain vehicles, and most retirement and pension plans. 7 U.S.C. § 2014(g); 7 C.F.R. § 273.8(e). Certain households are exempt from the resource cap altogether.

120. In some cases, an intending immigrant undergoing adjustment would be eligible for SNAP before his or her green card application is approved. More commonly, the applicant undergoing the public charge determination only would be eligible for SNAP five years after he or she adjusts. But an adjusted LPR may be eligible for SNAP sooner if he or she is under age 18, in receipt of a disability-based benefit, can be credited with 40 qualifying quarters of work, or was lawfully residing in the U.S. and 65 or older when PRWORA was signed into law on August 22, 1996.

B. Medicaid

121. Congress created the federal Medicaid program in 1965 to assist states in furnishing medical assistance to individuals and families.[49] As described by the federal

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47 For example, Able Bodied Adults without Children, or "ABAWDs" are required to work or participate in a work program for at least 20 hours per week in order to receive SNAP benefits for more than three months in a 36-month period. *See* 7 C.F.R. § 273.24.

48 CBPP Comment at 45–47.

49 Social Security Amendments of 1965, Pub. L. No 89-97, 79 Stat. 286.

Centers for Medicare and Medicaid Services, which works in partnership with state governments to administer Medicaid, "Medicaid provides health coverage to millions of individuals, including eligible low-income adults, children, pregnant women, elderly adults and people with disabilities."[50] The income and resource eligibility criteria for federal Medicaid depend on, among other criteria, the recipient's age and income, and whether the person is blind or disabled.[51]

122. Many recipients of Medicaid work. Nearly 80 percent of non-elderly, non-disabled adult Medicaid beneficiaries are in working families.[52] Among Medicaid enrollees who work, over half work full-time for the entire year in which they participate in the program.[53] Research shows that access to affordable health insurance and care, like Medicaid, "promotes individuals' ability to obtain and maintain employment."[54]

123. In the 37 states (including the District of Columbia) that have adopted Medicaid expansion under the Affordable Care Act, the program is available to workers with no resources cap and with earnings above the poverty level.[55] For example, parents with dependent children, and adults aged 19–64, can qualify for federal Medicaid if their income

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50 Centers for Medicare & Medicaid Services, *Medicaid*, https://www.medicaid.gov/medicaid/index.html (last visited Aug. 24, 2019).

51 *See* Centers for Medicare & Medicaid Services, *Eligibility*, https://www.medicaid.gov/medicaid/eligibility/index.html (last visited Aug. 24, 2019).

52 CBPP Comment at 39.

53 Rachel Garfield et al., *Understanding the Intersection of Medicaid and Work: What Does the Data Say?*, Kaiser Family Foundation, at 4 (Aug. 2019), http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work-What-Does-the-Data-Say.

54 CBPP Comment at 40–41 (quoting Larisa Antonisse and Rachel Garfield, *The Relationship Between Work and Health: Findings from a Literature Review*, Kaiser Family Foundation (Aug. 2018), https://www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/).

55 Kaiser Family Foundation, *Status of State Medicaid Expansion Decisions: Interactive Map*, (Aug. 1, 2019), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/.

does not exceed 133 percent of the FPG.[56] Medicaid expansion was a key component of the Affordable Care Act and appeared in the first public draft of the legislation.[57]

124. A person adjusting to LPR status through a family member who is subject to public charge would become eligible for federal Medicaid after he or she adjusts and has been a so-called "qualified alien" for five years.[58]

125. Through New York State of Health, New York's state-run Health Exchange, New Yorkers are screened for and enrolled in Medicaid as well as other types of government-funded health insurance, government-subsidized private health insurance, and non-subsidized private health insurance. Government-funded insurance provided by New York includes medical assistance that is available to persons not eligible for federal Medicaid. *See* N.Y. Soc. Serv. Law §§ 366(1)(g), 369-gg. Immigrants who are eligible for this form of state-funded health insurance include qualified aliens subject to the five-year limit and persons considered permanently residing under color of law, including persons who have applied for deferred action for childhood arrivals ("DACA") or other deferred action, and applicants for asylum.

126. Some New Yorkers are eligible for New York's Basic Health Plan, called the "Essential Plan." N.Y. Soc. Serv. Law §§ 366(1)(g), 369-gg. The Essential Plan provides coverage to certain immigrants who are ineligible for federal Medicaid, as well as for New Yorkers with income from 139 percent to 200 percent of the FPG who must pay a low monthly

[56] 42 U.S.C. § 1396a(a)(10).
[57] John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 Law Libr. J. 131, 137 (2013).
[58] *See* 8 U.S.C. § 1641(b).

premium for coverage.[59] As required by Congress, immigrants must be "lawfully present" to be eligible for private qualified health plans pursuant to the Affordable Care Act, including the Essential Plan.

127. Although such non-federal Medicaid forms of health insurance do not count as "public benefits" under the Rule's public charge test, many noncitizens fear that enrollment in state-funded programs and even private coverage (which often have the same name as the state's Medicaid program) will carry adverse immigration consequences. Almost all recipients of New York Medicaid are required to enroll in private Medicaid managed care plans. N.Y. Soc. Serv. Law § 364-j. Since many of the same health insurance companies offer commercial, Medicaid, Medicare, Essential Plan, and/or Children's Health Insurance Program coverage, many New Yorkers do not understand which program they are in, especially if their eligibility shifts year to year.

C. Federal Rental Assistance Benefits

128. The Rule includes three types of federal rental assistance in its definition of "public benefit": (i) public housing, (ii) Section 8 vouchers; and (iii) project-based Section 8. Most tenants of public housing pay 30 percent of their income (after certain deductions) for rent and utilities. Federal subsidies, issued by the Department of Housing and Urban Development to the local public housing authority that owns and manages the public housing, are intended to cover the gap between tenant rents and operating costs. Section 8 housing choice vouchers provide a rental subsidy to the participant household that can be used to rent a privately owned housing unit. 42 U.S.C. §§ 1437f, 1437u. Households receiving project-

[59] *See* N.Y. State of Health, *Essential Plan at a Glance* (June 2019), https://info.nystateofhealth.ny.gov/sites/default/files/Essential%20Plan%20At%20A%20Glance%20Card%20-%20English.pdf.

based Section 8 benefit from a subsidy that is attached to the residence where they reside. 42 U.S.C. § 1437f; 24 C.F.R. parts 5, 402, 880–884, 886. Each of these federal rental assistance programs has an income eligibility requirement measured by the local Area Median Income ("AMI") for the size of the family receiving the benefit.

129. Federal rental assistance programs support work by enabling low-income households to live in stables homes. Of the non-elderly, non-disabled households receiving federal rental assistance, approximately two-thirds are headed by working adults.[60] That number is even higher for households containing non-citizens, where approximately three-quarters of non-elderly, non-disabled households report earning wages.[61]

130. As with SNAP and Medicaid, recipients of federal rental assistance may have incomes above the poverty threshold and assets or other resources. Under these three rental assistance programs, while there are requirements for targeting assistance to lower-income households (below 30 percent of AMI), a household can qualify for assistance with income up to 80 percent of the AMI, which for a family of four in New York City is $85,360 per year,[62] more than three times above the FPG of $25,750 for a family that size.[63]

V. The Rule Violates the Administrative Procedure Act in Numerous Ways

131. The Rule violates the APA in several respects, including that it is "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "contrary to constitutional right," *id.* § 706(2)(B), and "in excess of statutory jurisdiction, authority, or limitations," *id.* § 706(2)(C). This section discusses several

60 CBPP Comment at 48.
61 *Id.*
62 N.Y.C. Dep't of Housing Preservation & Development, *Area Median Income (AMI)*, https://www1.nyc.gov/site/hpd/renters/area-median-income.page (last visited Aug. 24, 2019).
63 *See* U.S. Dep't of Health & Human Services, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, https://aspe.hhs.gov/poverty-guidelines (last visited Aug. 24, 2019).

ways in which the Rule violates the APA, including that (1) the Rule's definition of "public charge" is contrary to the INA; (2) the Rule is unlawfully retroactive and penalizes past conduct that was not part of the public charge analysis at the time it occurred; (3) the Rule is so confusing, vague, and broad that it fails to give notice of conduct to avoid and invites arbitrary and inconsistent enforcement; (4) the Rule unlawfully discriminates against individuals with disabilities; (5) the Rule's changes to the public charge bond provision impermissibly renders such bonds inaccessible; and (6) the Rule is arbitrary and capricious in other ways.

A. The Rule's Definition of "Public Charge" is Contrary to the INA

132. As discussed above, *see supra* ¶¶ 59–90, the Rule's definition of "public charge" as an individual who receives a minimal amount of noncash public benefits is contrary to the interpretation of "public charge" that has endured for 130 years: an individual primarily dependent on the government for subsistence. The statutory meaning of the term "public charge" is evident from, among other things, (i) the plain meaning of the phrase, (ii) the judicial and administrative interpretation of the term since it first became part of federal immigration law; (iii) Congress's approval of that interpretation in repeatedly reenacting the statute; and (iv) Congress's rejection of efforts to expand that interpretation in the manner the Rule now seeks to accomplish.

133. Accordingly, the Rule is not in accordance with the law and is in excess of DHS's statutory jurisdiction. 5 U.S.C. §§ 706(2)(A), 706(2)(C).

B. The Rule Retroactively Penalizes Noncitizens for Past Conduct that Has Never Been Relevant to Public Charge Determinations

134. Apparently recognizing that retroactive application of the Rule would be unfair and unlawful, the Rule purports not to consider receipt of public benefits other than cash

assistance and long-term institutionalized care (which were considered in public charge determinations under the Field Guidance) obtained prior to the Rule's effective date. 84 Fed. Reg. at 41,504. But both the Rule itself and the proposed bureaucratic form that accompanies the Rule make clear that DHS *does* intend to consider past receipt of public benefits when determining whether a noncitizen is inadmissible on public charge grounds. Such retroactive application is unlawful, because it is arbitrary and capricious and because DHS lacks the statutory authority to promulgate retroactive rules concerning public charge determinations. *See* 8 U.S.C. § 1182.

135. The Rule applies retroactively in several ways. It (1) explicitly penalizes *any* past receipt of, rather than primary dependence on, cash benefits; (2) requires applicants to document receipt of all past *noncash* benefits on a newly-created Form I-944; (3) evaluates, for the first time, credit scores based on years of past financial activity; (4) assesses English language proficiency that would require years of preparation; and (5) ends the ability of applicants to rely on sponsor affidavits to overcome the heavily weighted "negative" factors that were never before considered. The Rule thus greatly increases the likelihood of a public charge determination based on numerous past activities that were never evaluated or even seen as relevant under the Field Guidance.

136. *First*, the rule retroactively penalizes any past receipt of cash assistance, including amounts that would not give rise to a public charge finding under the Field Guidance. Under the Field Guidance, a noncitizen may be found to be inadmissible as a public charge if she is likely to become "primarily dependent on the government for subsistence, as demonstrated by . . . the receipt of public cash assistance for income maintenance." 64 Fed. Reg. at 28,689. The Field Guidance further provides that "[t]he longer ago an alien received

such cash benefits . . . the less weight [this] factor[] will have as a predictor of future receipt," and "the length of time an applicant has received public cash assistance is a significant factor" as well. *Id.* at 28,690. The Field Guidance explains that receipt of cash assistance is just one factor in the totality of the circumstances test and that, for example, a noncitizen who received cash public benefits but also has an affidavit of support or full-time employment "should be found admissible." *Id.* The Field Guidance has been relied upon by noncitizens, lawyers, and advocates for twenty years.

137. The Rule completely changes this calculus. The Rule states that "DHS will consider, as a negative factor . . . ***any amount of cash assistance*** . . . received, or certified for receipt, before" the effective date of the Rule. 84 Fed. Reg. at 41,504 (proposed 8 C.F.R. § 212.22(d)) (emphasis added). Thus, while the Field Guidance considered receipt of means-tested cash assistance only to the extent it tended to show likely "primary dependence on the government for subsistence," *see* 64 Fed. Reg. at 28,693, the new Rule could predicate a public charge finding on past receipt at any time of "any amount of cash assistance" (even, apparently, cash assistance below the threshold of 12 months within a 36-month period). The proposed Rule, therefore, penalizes past receipt of cash assistance that, at the time it was received, would not have resulted in a public charge determination.

138. *Second*, the Rule requires applicants to submit evidence of past receipt of noncash benefits. While the Rule purports to direct DHS personnel not to consider past receipt of public benefits other than cash assistance or institutionalization, DHS's actions say the opposite. In connection with issuing the Rule, DHS prepared a form (Form I-944)[64] for

[64] USCIS, Form I-944, Declaration of Self Sufficiency, https://www.regulations.gov/document?D=USCIS-2010-0012-63772; USCIS, Form I-944, Instructions for Declaration of Self Sufficiency, https://www.regulations.gov/document?D=USCIS-2010-0012-63771.

submission by those applying for immigration benefits with USCIS, such as adjustment of status or extension or stay or change in status, "to demonstrate that the applicant is not likely to become a public charge under section 212(a)(4) of the Act," 83 Fed. Reg. at 51,254; *see also* 84 Fed. Reg. at 41,295. And the form requests precisely the information DHS says it will not consider. Form I-944 requires immigrants seeking admission or adjustment of status to disclose whether they have "***ever*** applied for" or received the public benefits enumerated in the Rule (emphasis added). Applicants are required to respond to detailed questions about all such benefits they have received at any time. Neither Form I-944 nor its Instructions say that benefits applied for or received before the Rule's effective date—benefits that were not considered in public charge determinations when they were applied for or received—will not be considered.

139. DHS's requirement that such benefits be disclosed to the personnel making public charge determinations is also so onerous as to render it effectively unworkable. As legal services providers have made clear during the public comment period, the complexity of the modern public benefits landscape, the administrative hurdles to recipients of and applicants for benefits, and the likelihood of errors in calculating exact amounts of public benefits, including noncash benefits, received make it "virtually impossible for applicants to accurately self-report."[65]

140. Further, this disclosure requirement clearly indicates that application for or receipt of such benefits could be considered in assessing whether the applicant is likely to become a public charge. At a minimum, DHS personnel reviewing an applicant's Form I-944 will see information about pre-Rule receipt of benefits and have that information in mind when

[65] New York Legal Assistance Group, Comment, at 7 (Dec. 10, 2018).

evaluating whether the applicant is inadmissible. It is both unfair and unlawful to punish a noncitizen under a new Rule for conduct that did not violate any rule at the time it occurred.

141. *Third*, the Rule directs adjustment officers, for the first time, to evaluate applicants' "credit scores," an inherently backward-looking criterion, that subjects applicants to evaluations of reasonable past financial conduct that was never before considered. *See* 84 Fed. Reg. at 51,188. There is no immigration benefit for which eligibility has ever taken into account the credit scores compiled by private credit rating companies. Applicants who have made reasonable financial decisions, such as taking on debt that would assist them in becoming financially stable—for example, a loan for a car that will allow them to work, or schooling that will increase their skills—will be penalized by such past decisions.

142. *Fourth*, the Rule includes an evaluation of English language proficiency that, in addition to lacking any measurable standard, penalizes applicants for decisions to forego English language instruction in reliance on the fact that no immigration benefit other than naturalization is premised on English language proficiency. *See* 84 Fed. Reg. at 51,195. Because achieving proficiency is a time-consuming process that can take years of preparation and substantial monetary commitment, this factor impermissibly penalizes applicants for past decisions made in reliance on then-current rules.

143. *Fifth*, the Rule now penalizes applicants who expected to be able to overcome a public charge determination by having their sponsors submit affidavits of support pursuant to 8 U.S.C. § 1183a(a)(1). *See* 84 Fed. Reg. at 51,117. Under IIRIRA, noncitizens seeking admission through family-sponsored immigration and some forms of employment-sponsored immigration are required to have their sponsor submit such an affidavit as part of their application for admission to the United States. *See* 8 U.S.C. §§ 1183, 1183a. In practice,

affidavits of support have provided sufficient assurance that an individual will not become a public charge, and properly executed affidavits have been deemed sufficient to satisfy a public charge analysis.[66] Intending immigrants who received benefits, including cash assistance (whose receipt prior to the effective date is a negative factor), did so in reliance on the practice that a sponsor affidavit—an enforceable agreement with the U.S. government that the sponsor would support them—would overcome a potential public charge determination.

144. The Rule thus penalizes noncitizens for decisions made in reliance on existing law. For twenty years, noncitizens have made decisions relying on the express terms in the Field Guidance. The Field Guidance made clear that neither mere receipt of cash benefits nor acceptance of supplemental noncash benefits would subject an applicant to a public charge finding, particularly for those filing with the support of sponsor affidavits, nor was credit score or English language proficiency even mentioned as a consideration. The Rule penalizes reliance on these clear rules. In applying this new standard retroactively, the Rule increases every noncitizen's liability for activity that at the time had no negative consequences.

145. DHS identifies no authority that would permit it to promulgate retroactive rules. Without express authorization from Congress, DHS lacks the power to issue this Rule.

C. The Rule is So Confusing, Vague, and Broad that it Fails to Give Applicants Notice of Conduct to Avoid and Invites Arbitrary, Subjective, and Inconsistent Enforcement

146. The Rule is complex and confusing. It transforms the process for determining public charge through a series of changes both to the benefits considered relevant to the public charge determination, and to the assessment and "weighting" of other qualities.

[66] *See* CBPP Comment at 30; Center for Law and Social Policy, Comment, at 106 (Dec. 7, 2018) (citing 9 FAM § 302.8-2(B)(3)) [hereinafter "CLASP Comment"].

The Rule and the many internal inconsistencies within it fail to give applicants notice of conduct to avoid, and fail to provide adjudicators with clear guidelines to apply.

147. These vague, broad, and standardless factors make it impossible for DHS officers to administer the Rule in an objective and consistent manner, or for applicants to predict how it will be applied. Likewise, an officer administering the Rule would have no way to reconcile inconsistencies between the Rule itself and the preamble purporting to explain the Rule.

148. Many of the retroactive elements of the Rule pose challenges to administering the Rule objectively and consistently. For example, Form I-944 requires immigration officers to obtain information about ***any*** past receipt of noncash public benefits—even benefits received prior to the Rule's effective date—even though those same officers are being instructed in the Rule ***not*** to consider such benefits.

149. The negative factor relating to credit scores is subject to arbitrary application because the Rule fails to consider many scenarios that could affect an applicant's credit score. For example, although the Rule specifically states that "bankruptcies" should form part of the credit score analysis, it provides no guidance about how to treat an applicant who took advantage of bankruptcy laws to discharge and restructure debts. An immigration officer has no way to know whether to treat such a bankruptcy as a positive factor (reflecting sophistication or financial prudence) or a negative factor (reflecting excessive debt and poor financial management). And the Rule is silent about whether "bankruptcies" (or "arrests, collections, actions, [and] outstanding debts") that occurred before its effective date may be considered. *See* 84 Fed. Reg. at 41,425–26.

150. Many other vague factors also invite arbitrary enforcement of the Rule. For example, the English proficiency factor—which comes with no standard for "proficiency" to guide either applicant or immigration officer—may be applied by each officer in a different way depending on the officer's own language comprehension skills or the officer's ability to understand a non-U.S. accent. While the I-944 Form suggests that applicants provide "certifications" of English language courses, the Rule offers no guidance as to how to evaluate these certifications.

151. Beyond that, there are inconsistencies between the Rule and the preamble's description of how the Rule is supposed to work that invite arbitrary enforcement. For example, the preamble to the Rule states that "active duty service members, including those in the Ready Reserve, and their spouses and children" are exempt from their use of public benefits being counted against them. 84 Fed. Reg. at 41,372. But, although the Rule does exclude benefits used by individuals who are family members of active-duty service members who are noncitizens, it inexplicably does not exclude benefits used by noncitizen family members of active-duty service members who are U.S. citizens. This inconsistency leaves immigration officers without clear law to apply to applicants who are spouses or children of active-duty U.S. citizen service members.

152. As another example, the preamble to the Rule states that having non-private health insurance, even if it is not Medicaid, will be given heavily negative weight if the applicant has a qualifying health condition. 84 Fed. Reg. at 41,445 (stating that DHS considers it a "heavily weighted negative factor" if an applicant lacks "financial means to pay for reasonably foreseeable medical costs if the [non-citizen] does not have private health insurance"). But nothing in the Rule itself suggests that having non-private health insurance

other than Medicaid counts as a negative factor. To the contrary, the Rule specifically states that, if an applicant has a medical condition that is likely to require extensive treatment, an immigration officer should consider whether the applicant can pay for reasonably foreseeable medical costs through health insurance "not designated as a public benefit . . . ." 84 Fed. Reg. at 41,503 (proposed 8 C.F.R. § 212.22(b)(4)(2)(H)). Furthermore, to the extent this provision expresses a bias in favor of employer-provided health insurance, it is in conflict with the fact that many noncitizens work in industries where employers are less likely to provide health insurance.

153. The distinction in the Rule between Medicaid and other forms of medical insurance poses additional challenges to consistent enforcement of the Rule (as well as to green card applicants and their advisors). As discussed above, *supra* ¶¶ 125–27, in states like New York where there are numerous forms of health insurance offered by the same managed care plans, a USCIS officer (as well as applicants and their advisors) will have difficulty distinguishing between health benefits that trigger the public charge, namely federal Medicaid, and other forms of health insurance maintained by the same companies whose receipt is not a negative factor under public charge.

D. The Rule Unlawfully Discriminates Against Individuals with Disabilities

154. The Rule discriminates against individuals with disabilities in violation of the Rehabilitation Act of 1973 ("Rehabilitation Act"), Pub L. No. 93-112, 87 Stat. 355. It does so by expressly treating disability as a negative factor—indeed, as multiple, duplicative negative factors—in making public charge determinations. The Rule thus conflicts with Section 504 of the Rehabilitation Act, which provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by an Executive agency." 29 U.S.C. § 794(a).

155. Starting in 1973, Congress began to pass a series of historic civil rights laws prohibiting discrimination on the basis of disability in public and private life: barring disability discrimination in federally funded programs by the federal government itself, in private and public employment, in state and local programs and services, and in public accommodations. These laws were designed to promote the goal of enabling individuals with disabilities to achieve equality of opportunity, full inclusion, and integration in society. The Rule ignores these laws and attempts to roll back the clock to a time when disabled individuals were not permitted to fully participate in society.

156. The first major federal civil rights statute extending protections to the disabled was the Rehabilitation Act, which authorized vocational rehabilitation grants and prohibited disability discrimination in federally funded programs. 29 U.S.C. § 784. In 1978, Congress extended the Rehabilitation Act protections to prohibit discrimination by the Federal government itself. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 95 Stat. 2955.

157. In 1990, Congress passed the Americans with Disabilities Act ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, to prohibit discrimination against individuals with disabilities in employment, local and state government programs and services, and public accommodations. In passing the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

158. In 2008, following a series of Supreme Court cases that had narrowly construed the definition of disability under the ADA, Congress acted to reinforce the intent of these civil rights statutes by passing the ADA Amendments Act, which amended the ADA and the Rehabilitation Act to clarify that the definition of disability in each statute was to be "construed in favor of broad coverage of individuals" to ensure "maximum" coverage.[67]

159. As a program or activity conducted by DHS, public charge determinations are subject to the Rehabilitation Act.[68]

160. DHS regulations implementing the Rehabilitation Act prohibit the agency from denying a benefit or service "on the basis of disability." 6 C.F.R. § 15.30(b)(1). These provisions provide further that the agency may not "utilize criteria or methods of administration" that would: "(i) Subject qualified individuals with a disability to discrimination on the basis of disability; or (ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability." *Id.* § 15.30(b)(4).

161. The Rule violates the Rehabilitation Act and the implementing regulations by creating a new discriminatory scheme that is triggered by disability.

162. *First*, the Rule imposes a negative "health" factor based on disability alone, providing that "diagnos[is] with a medical condition that is likely to require extensive medical treatment," with nothing more, is treated as a negative factor. *See* 84 Fed. Reg. at 41,502 (proposed 8 C.F.R. § 212.22(b)(2)).

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[67] *See* The Americans with Disabilities Amendments Act ("ADAA") Pub. L. No. 110-325, 122 Stat. 3553, codified at 42 U.S.C. § 12102 et seq., and codified at 29 U.S.C. § 705(9) (B) (Rehabilitation Act provisions incorporating these ADA definitions.); *see also* Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204 (explaining that the ADA Amendments Act was intended to: "effectuate Congress's intent to restore the broad scope of the ADA by making it easier for an individual to establish that he or she has a disability").

[68] *See* Dawn E. Johnsen, Department of Justice Office of Legal Counsel, *Letter Opinion for the General Counsel Immigration and Naturalization Service* (Apr. 18, 1997); Robert B. Shanks, *Memorandum Re: Section 504 of the Rehabilitation Act of 1973* (Feb. 2, 1983).

163. *Second*, the Rule imposes an additional heavily weighted negative factor for applicants who (a) have a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with their ability to provide for himself or herself, attend school, or work; and (b) are uninsured and have neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition. *See* 84 Fed. Reg. at 41,504 (proposed 8 C.F.R. § 212.22(c)(1)(iii)).

164. *Third*, the Rule imposes a separate negative factor for an applicant who lacks "sufficient household assets and resources (including, for instance, health insurance not designated as a public benefit under 8 C.F.R. § 212.21(b)) to pay for reasonably foreseeable medical costs, such as costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work." *See* 84 Fed. Reg. at 41,503 (proposed 8 C.F.R. § 212.22(b)(4)(H)).

165. The Rule thus takes a single characteristic common to individuals with disabilities—a chronic health condition—and counts it as a negative factor ***three*** different times in the totality of the circumstances analysis: once as a negative factor relating to "health," once as a negative factor relating to "assets, resources, and financial status," and once as an independent "heavily weighted negative factor" related, again, to health and financial resources. DHS provides no explanation to justify this triple-counting, which results in disproportionally punishing individuals with disabilities. Indeed, the agency "acknowledges that multiple factors may coincide or relate to each other," and it makes no effort to explain or justify its conclusory

denial that it is "impermissibly counting factors twice," let alone three times. 84 Fed. Reg. at 41,406.

166. The Rule also utilizes a complex and confusing web of discriminatory principles to evaluate health insurance coverage—providing positive and negative weights to health insurance coverage depending on whether it is "private," or "publicly funded or subsidized," or, as in the case of federal Medicaid, a "public benefit." Having "private health insurance" is a heavily weighted positive factor under the Rule, but DHS has arbitrarily determined that applicants cannot receive this heavily weighted credit if they receive Affordable Care Act tax credits for their insurance premiums, despite tax credits only being available to individuals up to 400 percent of the FPG. This disqualification of coverage under the Affordable Care Act is not disqualifying if the coverage was received through the "marketplace," 84 Fed. Reg. at 41,388, a distinction that was not set forth in the NPRM.

167. Many individuals with disabilities must rely on federal Medicaid to meet their needs because it covers services and medical equipment that are often not available under private insurance. Despite this, under the Rule, federal Medicaid is defined as a "public benefit," and past receipt of federal Medicaid is considered a heavily weighted negative factor.

168. Even though the Rule purports to designate only federal Medicaid as a "public benefit," it nonetheless punishes individuals, including individuals with disabilities, for using other non-private forms of health insurance. For example, health insurance provided by New York State's Essential Plan is not a federal Medicaid benefit and does not count as a "public benefit" under the Rule. However, individuals with disabilities who have Essential Plan coverage will nonetheless be assessed a heavily weighted negative factor under the Rule's provision that punishes individuals who have chronic medical conditions and do not have "the

prospect of obtaining ***private*** health insurance." *See* 84 Fed. Reg. at 41,504 (proposed 8 C.F.R. § 212.22(c)(1)(iii)) (emphasis added); 84 Fed. Reg. at 41,445. In addition, because Essential Plan is not private health insurance, an applicant receiving Essential Plan benefits cannot be credited with the heavily-weighted positive factor of having "private health insurance" under proposed 8 C.F.R. § 212(c)(2)(ii). To the contrary, the Essential Plan is considered to be "publicly-funded or subsidized health insurance." 84 Fed. Reg. at 41,428.

169. DHS received numerous comments explaining that the Rule would negatively and disproportionately affect people with disabilities, those with chronic health conditions, and other vulnerable individuals. DHS did not deny this outcome and instead merely responded, without explanation, that the agency "does not intend to disproportionately affect such groups." 84 Fed. Reg. at 41,429.

170. DHS is unapologetic about this discriminatory scheme, which represents a clear departure from the mandates of the Rehabilitation Act and its conforming regulations. In fact, as justification for such harsh treatment of individuals with disabilities, DHS relies on the very archaic views of disability that Congress sought to eradicate in the Rehabilitation Act and the ADA, falling back on the excuse that consideration of health "has been part of public charge determinations historically." 84 Fed. Reg. at 41,368. In support of this point, DHS relies upon a judicial opinion from 1911 in which one individual was excluded on the basis of public charge because "he had a 'rudimentary' right hand affecting his ability to earn a living," another individual had "poor appearance and 'stammering,'" and a third individual "was very small for his age." 84 Fed. Reg. at 41,368 n.407 (citing *Barlin* v. *Rodgers*, 191 F. 970, 974–977 (3d Cir. 1911)).

171. The Rule is thus arbitrary and capricious because it discriminates against people with disabilities and fails to address the conflict between the Rule and Section 504 of the Rehabilitation Act.

E. The Rule's Changes to the Public Charge Bond Provision Render Such Bonds Effectively Inaccessible

172. Since 1907, the federal immigration laws have provided a procedure by which a noncitizen excludable on public charge grounds could be admitted "upon the giving of a suitable and proper bond." Immigration Act of 1907, 59 Cong. Ch. 1134 § 2, 34 Stat. 898 § 26. A public charge bond is a contract between the United States and a counterparty who pledges a sum of money (secured by cash or property or underwritten by a certified surety company) to guarantee that the noncitizen will not become a public charge during a certain time frame. *See* 8 U.S.C. § 1183; 8 C.F.R. § 103.6(c)(1); 8 C.F.R. § 213.1. Currently, the minimum threshold for posting a public charge bond is $1,000. *See* 8 C.F.R. § 213.1.

173. As discussed above, in 1996, Congress created for the first time an alternative to a public charge bond: an enforceable affidavit of support. *See* 8 U.S.C. §§ 1182(a)(4)(B)(ii), 1183a; *supra* ¶ 78. The advent of an enforceable affidavit of support largely obviated the need for public charge bonds, which have been required only "rarely" since the IIRIRA was enacted. *See* 83 Fed. Reg. at 51,219 n.602.

174. The Rule dramatically alters this practice. As described above, under the Rule, an affidavit of support is no longer sufficient for admissibility. Rather, it is only one positive factor—and not a heavily weighted one—in the totality of the circumstances analysis. Accordingly, under the Rule, the posting of a public charge bond is once again the only way to overcome a determination that a noncitizen is inadmissible as likely to become a public charge.

But the Rule takes extreme steps to make the statutorily-authorized public charge bond inaccessible and unworkable.

175. *First*, the Rule provides that a noncitizen can post a public charge bond only with DHS's permission, and DHS is directed to exercise that discretion in favor of permitting a bond only if the applicant possesses no heavily weighted negative factors, the same factors that lead to a finding of inadmissibility in the first place. *See* 84 Fed. Reg. at 41,506 (proposed 8 C.F.R. § 213.1(b)) ("If an alien has one or more heavily weighted negative factors, . . . DHS generally will not favorably exercise discretion to allow submission of a public charge bond."). Thus, contrary to the statute and longstanding practice, the Rule creates a Catch-22 by making bonds available only to applicants who do not need them.

176. *Second*, the Rule would raise the minimum amount of such bonds from $1,000 to $8,100, annually adjusted for inflation. 84 Fed. Reg. at 41,506 (proposed 8 C.F.R. § 213.1(c)(2)). The amount of the bond required is not appealable. *Id.* A noncitizen whose income and assets render her inadmissible on public charge grounds under the proposed Rule is exceedingly unlikely to have $8,100 or more in cash or cash equivalents to secure such a bond. This minimum bond amount effectively regulates away the statutorily mandated availability of public charge bonds to overcome inadmissibility determinations.

177. *Finally*, the Rule also imposes draconian forfeiture procedures on the very few immigrants who might be offered the opportunity to post a public charge bond, and who might have assets to post such a bond. Existing federal regulations (which the Rule purports to incorporate) require a "substantial violation" in order to determine that a public charge bond has been breached. 8 C.F.R. § 103.6(e); *see* 84 Fed. Reg. at 41,455. The Rule, however, requires forfeiture of ***the entire bond*** for any violation of its terms, no matter how minor. In

other words, an immigrant who posts a $8,100 public charge bond and later receives 12 months of a "public benefit" within any 36-month period before the bond is formally cancelled—for example, an immigrant who receives $50 per month of cash benefits for a year after losing a job—would be required to forfeit the entire $8,100 bond. *See* 84 Fed. Reg. at 41,507 (proposed 8 C.F.R. § 213.1(h)(6)) ("The bond must be considered breached in the full amount of the bond.").

F. The Rule Is Arbitrary and Capricious in Other Ways

178. The Rule is arbitrary and capricious in other ways that violate the APA. It uses an arbitrary and capricious durational standard as a threshold for receipt of government benefits. The Rule's durational threshold—receipt of *any* amount of enumerated benefits for 12 cumulative months in any 36-month period—has no sound basis and is at odds with the Congressional intent that the public charge exclusion apply only to those who primarily depend on the government for subsistence. As another example, the Rule employs an arbitrary and capricious system of weighted factors to govern public charge determinations. Many of the factors themselves, like English language proficiency and credit scores, are supported by insufficient evidence and have no value for predicting who is likely to be a public charge. And the Rule provides no guidance, beyond designating factors as "negative," "positive," and "heavily weighted," for determining how different factors should be weighed against each other or considered in assessing the totality of the applicant's circumstances.

VI. The Rule Was Promulgated Without Authority

179. DHS lacks statutory authority to promulgate the Rule.

180. DHS cites as its principal legal authority for promulgating the Rule, and for making "public charge inadmissibility determinations and related decisions," section 102 of

the Homeland Security Act (the "HSA"), codified at 6 U.S.C. § 112, and section 103 of the INA, codified at 8 U.S.C. § 1103. 84 Fed. Reg. at 41,295. Neither provision authorizes DHS to promulgate this Rule as it relates to public charge determinations for noncitizens seeking to adjust their status to lawful permanent resident. Rather, that authority belongs exclusively to the Attorney General of the United States.

181. Section 102 of the HSA created the position of Secretary of Homeland Security, and broadly defined the Secretary's "functions." *See* 6 U.S.C. § 112. Nothing in that section provides the Secretary with rulemaking authority over public charge determinations.

182. Section 103 of the INA describes the "powers and duties" of the Secretary of Homeland Security, the Under Secretary, and the Attorney General, as it relates to immigration laws. *See* 8 U.S.C. § 1103. That section provides: "The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, ***except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the*** President, ***Attorney General***, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers." 8 U.S.C. § 1103(a)(1) (emphases added). Section 103 further provides that the Secretary of Homeland Security "shall establish such regulations . . . as he deems necessary for ***carrying out his authority*** under the provisions of this chapter." *Id.* § 1103(a)(3) (emphasis added). Accordingly, DHS has the authority to administer and enforce the INA, including through rulemaking, except with respect to provisions of the INA that relate to the powers of the Attorney General (among others).

183. The public charge provision of the INA that is the subject of the proposed Rule specifically relates to the "powers, functions, and duties conferred upon the . . . Attorney

General." Specifically, the public charge provision—section 214(a)(4) of the INA—provides that a noncitizen "who, in the opinion of the consular officer at the time of application for a visa, or ***in the opinion of the Attorney General at the time of application for admission or adjustment of status***, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A) (emphasis added). The provision goes on to enumerate the factors that "the Attorney General shall at a minimum consider" when "determining whether an alien is inadmissible under this paragraph." *Id.* § 1182(a)(4)(B). Accordingly, it is the Attorney General, not DHS or the Secretary of Homeland Security, who is responsible for making public charge inadmissibility determinations for noncitizens seeking admission or adjustment of status.[69] The Rule was promulgated by an agency acting beyond its jurisdiction, and is *ultra vires* and void as a matter of law.

VII. The Process for Promulgating the Rule Violates the Law

184. The Rule violates the APA because it was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). This section describes how DHS's process for promulgating the Rule was deficient because (1) DHS failed to respond to significant comments, and (2) DHS failed to provide a reasoned explanation for changing policy direction from the Field Guidance.

A. DHS's Process for Promulgating the Rule was Procedurally Deficient

185. DHS published the NPRM on October 10, 2018. *See* 83 Fed. Reg. 51,114. DHS invited public comment on the proposed rule. The comment period closed on December

[69] Although the public charge provision of the INA provides that inadmissibility determinations for visa applicants are to be made by "consular officer[s]," 8 U.S.C. § 1182(a)(4), the HSA specifically transferred rulemaking authority concerning visa applications to the Secretary of Homeland Security. *See, e.g.*, 6 U.S.C. § 202(3); 6 U.S.C. § 236(b). Notably, the HSA did not specifically transfer rulemaking authority concerning adjustment of status applications to DHS.

10, 2018; over 266,000 public comments were filed. Although the vast majority of these comments criticized and opposed the Rule, DHS ignored or did not respond to numerous significant complaints.

186. We cite below just a few examples called to DHS's attention in comments on the proposed rule:

(i) The Rule is so vague, inconsistent, and lacking in measurable standards that it invites arbitrary and discriminatory application;

(ii) The requirement on the Form I-944 that applicants for adjustment disclose past receipt of benefits that were not counted in the public charge determination in the Field Guidance renders the Rule retroactive;

(iii) The Rule provides no standard for measuring English language proficiency, and learning English requires long-term preparation and expense which many applicants postpone until naturalization;

(iv) Advances in treating such illnesses as HIV, cancer, and diabetes enable many people to work, and these chronic conditions should not render an applicant a public charge;

(v) The dramatic increase in the public bond requirement—from $1,000 to $10,000 in the proposed Rule ($8,100 in the final Rule)—is arbitrary and unfair;

(vi) The harms to millions of immigrant families—including increased hunger, illness, and housing instability—cannot be justified.

187. DHS fails to respond meaningfully to significant comments about these issues, instead pushing forward with almost all of the provisions of the proposed rule in the NPRM intact, or with only minor changes that make no meaningful difference.

188. In addition to the non-exhaustive list of examples above, nowhere in the NPRM was there any reference to insurance premiums under the Affordable Care Act. The NPRM failed to give notice to the public that while the Rule would consider private health

insurance as a positive factor, it would not count insurance through the Affordable Care Act markets if the applicant obtained any tax subsidies. Thus, USCIS deprived the public of the opportunity to comment on this provision at all.

189. Numerous procedural anomalies characterized the promulgation and publication of the Rule. In addition to the purges of high-level DHS and USCIS officials, *see infra* ¶¶ 218, 223–24, 232, the Trump Administration has cut short the period of public and Congressional feedback that typically follows the closing of the notice-and-comment period.

190. Shortly before the publication of the final Rule, in a process required by a longstanding Executive Order, the Office of Interagency Affairs ("OIRA"), a component of the Office of Management and Budget, scheduled a series of meetings with stakeholders regarding the impacts of the Rule. *See* Executive Order 12,866 (1993). Although representatives from numerous state and local governments, as well as nationally known advocacy groups, scheduled meetings with OIRA to present their points of view on the Rule and its implementation, OIRA cut short the public feedback process, taking just a few meetings and cancelling the rest.

B. DHS Fails to Justify its Departure from the 1999 Field Guidance

191. DHS fails to provide a reasoned explanation for changing policy direction from the Field Guidance and promulgating the Rule for several reasons.

192. *First*, DHS fails to identify any problems with enforcement of the Field Guidance, which has been in continuous effect for over 20 years. DHS does not suggest that the Field Guidance has been ineffective or difficult to administer, or identify any adverse consequences from the Field Guidance. DHS contends that the Field Guidance is "overly permissi[ve]," 84 Fed. Reg. at 41,319, but does not identify a single adverse result flowing

from the Field Guidance's allegedly permissive standard that the Rule is meant to address. Rather, DHS simply states that it has "determined that it is permissible and reasonable to propose a different approach," 83 Fed. Reg. at 51,164, and that the public charge standard set forth in the Rule "furthers congressional intent" that noncitizens "be self-sufficient," *e.g.*, 84 Fed. Reg. at 41,319. But the agency provides no examples of how the goal of self-sufficiency has not been served by the Field Guidance.

193. *Second*, DHS fails to explain why its new definition of "public charge" better reflects Congressional intent than the definition established in the Field Guidance. DHS repeatedly states that the Rule reflects Congress's intent in PRWORA—which was enacted in 1996—that noncitizens "be self-sufficient and not reliant on public resources." *E.g.*, 84 Fed. Reg. at 41,319. But DHS fails to acknowledge that the Field Guidance—which was issued less than three years after PWRORA, under the administration of the same President who signed that bill into law—is far better evidence of the statute's meaning and congressional intent than the contrary interpretation included in the Rule 23 years later. DHS offers no evidence suggesting that INS mistook Congress's intent when it issued the Field Guidance in 1999, or that Congress viewed the Field Guidance as inconsistent with its intent.

194. *Third*, DHS offers no reasoned explanation for why it is necessary or appropriate to redefine "public charge" to mean the receipt of even a minimal amount supplemental benefits available to working families. DHS provides no evidence that mere receipt of such benefits has ever triggered a public charge finding, either before or after the Field Guidance was promulgated. DHS identifies no authority suggesting that receipt of noncash benefits has ever factored into a public charge determination, that receipt of public

benefits alone has been sufficient to render someone a public charge, or that receipt of public benefits has ever rendered a working individual a public charge.

195. DHS also offers no reasoned explanation for rejecting the expert views of agencies that administer the relevant public benefits that are reflected in the Field Guidance. In issuing the Field Guidance, INS explained that its definition of public charge—and decision to exclude noncash benefits from consideration—reflected evidence and input it received after "extensive consultation with" the agencies that administer such benefits. 64 Fed. Reg. at 28,692. DHS acknowledges that the Field Guidance reflects these consultations, but simply states that they do not foreclose a different interpretation. 84 Fed. Reg. at 41,351.

196. Indeed, emails between the White House and federal agencies while the Rule was being drafted demonstrate that those agencies were expressly discouraged from providing substantive input on whether to expand the definition of "public charge." In circulating drafts of the proposed rule within the Executive Branch, a White House official stressed that "***the decision of whether to propose expanding the definition of public charge, broadly, has been made at a very high level and will not be changing***" (emphasis in original).[70]

197. *Fourth*, the Rule does not explain the contradiction between the concern about the public health impacts of discouraging use of public benefits as described in the Field Guidance, and DHS's disregard of those impacts. DHS recognizes that the Field Guidance was issued in response to "confusion" about public charge that had resulted in immigrants foregoing benefits and consequent risks to public health. *See* 83 Fed. Reg. at 51,133 (citing 64

[70] *See* Yeganeh Torbati et al., *"No Comment": Emails Show the VA Took No Action to Spare Veterans from a Harsh Trump Immigration Policy*, ProPublica (Aug. 19, 2019), https://www.propublica.org/article/emails-show-the-va-took-no-action-to-spare-veterans-from-a-harsh-trump-immigration-policy.

Fed. Reg. at 28,676–77). DHS also acknowledges that the Rule will have a wide-spread chilling effect and a corresponding negative impact on public health. But it offers no reasoned explanation for its decision to disregard INS's concerns. Instead, DHS simply reiterates that its primary purpose is furthering "self-sufficiency," and that the Rule's chilling effect is an acceptable tradeoff in pursuing that asserted purpose. *See* 84 Fed. Reg. at 41,311–13.

198. *Fifth*, DHS fails to justify its abandonment of the "primary dependence" standard in the Field Guidance in favor of the durational standard in the rule: receipt of any enumerated benefits for 12 cumulative months in a 36-month period. As explained above, the "primary dependence" standard was based on more than a century of case law and Congress's recent intent in enacting PRWORA and IIRIRA. *See supra* ¶¶ 86–89. The new durational standard, by contrast, is based on DHS's conclusory assertion "that it is permissible and reasonable to propose a different approach." 83 Fed Reg. at 51,164. DHS acknowledges that its durational standard—which does not account for the *amount* of benefits received—will result in "potential incongruities," *i.e.*, arbitrary results. 84 Fed. Reg. at 41,361. DHS attempts to justify the durational standard based on inapposite data, such as data that measures the duration of time that individuals receive means-tested assistance, but fails to distinguish between use by citizens and noncitizens or otherwise explain how this data justifies its approach. *See* 84 Fed. Reg. at 41,360.

199. *Sixth*, DHS fails to address the legitimate reliance interests engendered by the Field Guidance. The Field Guidance, and the long history of public charge on which it is based, has permitted generations of immigrant families to build lives in the U.S. without fearing that their choices, including whether to seek public benefits, may have a negative impact on their immigration status (other than the choice to receive cash assistance or long-

term institutional care). U.S. immigration lawyers and advocates have likewise relied upon the simplicity and clarity of the Field Guidance to aid clients in making decisions about their lives and the consequences of using public benefits. The Rule fails to consider adequately the existence of these reliance interests and how they might affect implementation of the Rule.

200. For example, previous receipt of "any" cash assistance is now scored as a negative factor, even if the applicant was never primarily dependent on the benefit. Other choices made by applicants in the past similarly cannot be undone, such as having another child, choosing to work instead of improving English language skills, or defaulting on a loan from one creditor in favor of paying the rent. None of these decisions can be renegotiated. This policy effectively punishes individuals who legitimately relied on decades of agency interpretation to make important decisions in their lives. DHS provides no reasoned explanation for doing so.

VIII. The Rule Is Motivated by Impermissible Animus Against Immigrants of Color

201. The Rule is motivated by animus against immigrants from predominantly nonwhite countries, and, as designed, will disproportionately affect those nonwhite individuals.

202. The Rule, which originated in a "wish list" created by an anti-immigrant think tank associated with white supremacists, *see supra* ¶¶ 91–94, continues the pattern of hostility to immigrants that has characterized the Trump Administration's rhetoric and policies. The stated rationale for the Rule—to ensure that immigrants are self-sufficient—is, at best, a pretext for discrimination against immigrants, and in particular nonwhite immigrants, even those who are complying with the country's long-standing rules for obtaining lawful residence.

A. The President Has Repeatedly Expressed Hostility Toward Nonwhite Immigrants

203. President Trump has a long and well-documented history of disparaging and demeaning immigrants, particularly those from Latin American, African, and Arab nations—or, as he has put it while considering changes to immigration rules, immigrants from "shithole countries."[71] Through his words and deeds, he has repeatedly portrayed immigrants—and particularly nonwhite immigrants—as dangerous criminals who are "invading" or "infesting" this country and draining its resources.[72]

204. In announcing his presidential campaign, then-candidate Trump compared Mexican immigrants to rapists. He said: "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[73]

205. Throughout his primary campaign, candidate Trump derided the ethnic backgrounds of his political foes. For instance, he retweeted a post stating that fellow-candidate Jeb Bush must like "Mexican illegals because of his wife," who is Mexican,[74] and insinuated that Senator Ted Cruz was untrustworthy because of his Cuban heritage.[75] In May 2016, candidate Trump called into question the integrity and impartiality of U.S. District Judge

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71 BBC, *Donald Trump's 'racist slur' provokes outrage* (Jan. 12 2018), https://www.bbc.com/news/world-us-canada-42664173.

72 Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 9:52 AM), https://twitter.com/realDonaldTrump/status/1009071403918864385.

73 Washington Post, *Transcript of Donald Trump's Presidential Bid Announcement* (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/.

74 Jacob Koffler, *Donald Trump Tweets Racially Charged Jab at Jeb Bush's Wife*, Time (July 6, 2015), https://time.com/3946544/donald-trump-mexican-jeb-bush-twitter/.

75 *See* Rebecca Sinderbrand, *In Iowa, Trump Makes a Play for Cruz's Evangelical Base*, Wash. Post (Dec. 29, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/29/in-iowa-trump-makes-a-play-for-cruzs-evangelical-base/.

Gonzalo Curiel—an Indiana native who was presiding over a lawsuit against Trump University—because of Judge Curiel's ethnic heritage: "He's a Mexican. We're building a wall between here and Mexico. The answer is, he is giving us very unfair rulings—rulings that people can't even believe."[76]

206. Among President Trump's first actions as president—at the same time that the draft Executive Order from which the Rule derives was being developed—was to sign another executive order on January 26, 2017, banning all immigration from six Muslim majority countries. President Trump repeatedly made clear that his decision was driven by anti-Muslim sentiment, including by expressly "calling for a total and complete shutdown on Muslims entering the United States"[77]; justifying that by citing the internment of Japanese Americans during World War II[78]; and calling for the surveillance of mosques in the United States.[79]

207. In a June 2017 Oval Office meeting, the President is said to have berated administration officials about the number of immigrants who had received visas to enter the country that year, complaining that 2,500 Afghanis should not have gained entry because the country was "a terrorist haven," that 15,000 Haitians "all have AIDS," and that 40,000

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[76] Sean Sullivan & Jenna Johnson, *Trump Calls American-Born Judge 'a Mexican,' Points out 'My African American' at a Rally*, Wash. Post (June 3, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/06/03/trump-calls-american-born-judge-a-mexican-points-out-my-african-american-at-a-rally/.

[77] Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States*,' Wash. Post (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.

[78] Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC News (Dec. 8, 2015), https://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban/story?id=35648128.

[79] Jeremy Diamond, *Trump Doubles Down on Calls for Mosque Surveillance*, CNN (June 15, 2016), https://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/index.html.

Nigerians would never "go back to their huts" after seeing the United States.[80] Shortly thereafter, the Department of Homeland Security announced that it would be withdrawing Temporary Protected Status ("TPS") from immigrants from Haiti, El Salvador, and the Sudan.

208. The President's attacks on immigrants have only escalated since 2017. When discussing how to prosecute immigrants in sanctuary cities, Trump equated immigrants with "animals," stating "[y]ou wouldn't believe how bad these people are. These aren't people. These are animals."[81] He has repeatedly characterized immigration at the southern border, including a caravan of Central American asylum-seekers passing through Mexico as an "invasion."[82] He asserted falsely that the caravan consisted of both Middle Eastern terrorists and members of the Central American gang MS-13, thereby conflating the ethnicities of two minority groups that he reviles.[83] More recently, the President endorsed a proposal to transport and "release" migrants detained at the border into sanctuary cities, in the hopes that doing so would stoke racial and anti-immigrant tensions, thereby putting pressure on his political enemies.[84]

209. Most recently, as widely reported, the President told four members of Congress, all women of color, to "go back . . . [to] the totally broken and crime infested places

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80 Michael Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

81 Héctor Tobar, *Trump's Ongoing Disinformation Campaign Against Latino Immigrants*, The New Yorker (Dec. 12, 2018), https://www.newyorker.com/news/daily-comment/trumps-ongoing-disinformation-campaign-against-latino-immigrants.

82 *Id.*

83 *See id.*

84 *See* Rachael Bade & Nick Miroff, *White House Proposed Releasing Immigrant Detainess in Sanctuary Cities, Targeting Political Foes*, Wash. Post (Apr. 11, 2019), https://www.washingtonpost.com/immigration/white-house-proposed-releasing-immigrant-detainees-in-sanctuary-cities-targeting-political-foes/2019/04/11/72839bc8-5c68-11e9-9625-01d48d50ef75_story.html?utm_term=.bfdb455e37c4; Eileen Sullivan, *Trump Says He Is Considering Releasing Migrants in "Sanctuary Cities,"* N.Y. Times (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/us/politics/trump-sanctuary-cities.html?action=click&module=Top%20Stories&pgtype=Homepage.

from which they came."[85] And, in reference to Representative Ilhan Omar, a former refugee from Somalia who arrived in the United States as a child and became a citizen in 2000, smiled as supporters at a campaign rally chanted "send her back."[86]

210. In contrast to these expressions of hostility to nonwhite immigrants, the President has repeatedly expressed support for immigration of whites and Europeans. In March 2013, for instance, President Trump warned that Republicans are on a "suicide mission" if they support immigration reform, before calling for more immigration from Europe:

> Now I say to myself, why aren't we letting people in from Europe? . . . Nobody wants to say it, but I have many friends from Europe, they want to come in. . . . Tremendous people, hard-working people. . . . I know people whose sons went to Harvard, top of their class, went to the Wharton School of finance, great, great students. They happen to be a citizen of a foreign country. They learn, they take all of our knowledge, and they can't work in this country. We throw them out. We educate them, we make them really good, they go home—they can't stay here—so they work from their country and they work very effectively against this. How stupid is that?[87]

211. Likewise, in a January 2018 meeting, Trump reportedly expressed dismay that we do not "have more people from places like Norway, contrasting such immigrants with those from "shitholes countries" such as Haiti and countries in Africa."[88] According to sworn

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85 Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to 'Go Back' to the Countries They Came From*, N.Y. Times (July 14, 2019), https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-squad-congress.html.

86 *See* Meagan Flynn, *'Malignant, dangerous, violent': Trump rally's 'Send her back!' chant raises new concerns of intolerance*, Wash. Post (July 8, 2019), https://www.washingtonpost.com/nation/2019/07/18/malignant-dangerous-violent-trump-rallys-send-her-back-chant-raises-new-concerns-intolerance/?noredirect=on.

87 Pema Levy, *Trump: Let In More (White) Immigrants*, Talking Points Memo (Mar. 15, 2013), https://talkingpointsmemo.com/dc/trump-let-in-more-white-immigrants.

88 Jen Kirby, *Trump Wants Fewer Immigrants from "Shithole Countries" and More from Places Like Norway*, Vox (Jan. 11, 2018 5:55 PM), https://www.vox.com/2018/1/11/16880750/trump-immigrants-shithole-countries-norway.

Congressional testimony by Trump's former lawyer Michael Cohen, Trump once asked Cohen whether he could "name a country run by a black person that wasn't a shithole."[89]

B. President Trump Has Repeatedly Expressed Hostility Toward Immigrants Who Receive Public Benefits

212. President Trump has directed particular hostility toward the precise group at issue in this case: immigrants who receive public benefits.

213. In November 2018, President Trump advocated for the complete elimination of public benefits for immigrants who are already U.S. lawful permanent residents. Although undocumented immigrants are eligible for virtually no federal assistance, much less cash benefits, President Trump retweeted a post falsely claiming that "[i]llegals can get up to $3,874 a month under Federal Assistance program. Our social security checks are on average $1200 a month. RT [retweet] if you agree: If you weren't born in the United States, you should receive $0 assistance."[90] In an interview with Breitbart News published on March 11, 2019, President Trump was quoted as saying "I don't want to have anyone coming in that's on welfare."[91]

214. Similarly, during the presidential campaign, candidate Trump wrote a Facebook post falsely asserting: "When illegal immigrant households receive far more in federal welfare benefits—than []native American households—there is something CLEARLY

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89 Miles Parks, *GOP Attacks After Opening Focused on Trump: Highlights from Cohen's Testimony*, NPR (Feb. 27, 2019), https://www.npr.org/2019/02/27/698631746/gop-attacks-after-opening-focused-on-trump-highlights-from-cohens-testimony.

90 Héctor Tobar, *Trump's Ongoing Disinformation Campaign Against Latino Immigrants*, The New Yorker (Dec. 12, 2018), https://www.newyorker.com/news/daily-comment/trumps-ongoing-disinformation-campaign-against-latino-immigrants.

91 Alexander Marlow, et al., *Exclusive—President Donald Trump on Immigration: "I Don't Want to Have Anyone Coming in That's on Welfare"* (Mar. 11, 2019), https://www.breitbart.com/politics/2019/03/11/exclusive-president-donald-trump-on-immigration-i-dont-want-to-have-anyone-coming-in-thats-on-welfare/.

WRONG with the system!"[92] And in the first Republican presidential debate, he falsely complained that the Mexican government was sending immigrants to the United States "because they don't want to pay for them. They don't want to take care of them."[93]

C. Other Senior Trump Advisors Have Expressed the Same Animus Toward Immigrants Who Receive Public Benefits

215. President Trump's senior advisors on immigration, including those with significant responsibility for promulgating the Rule, have made similar statements. Several of President Trump's appointees and associates involved in his Administration's immigration policy, including former Attorney General Jefferson Sessions, Campaign Manager and Counselor to the President Kellyanne Conway, Senior Advisor to U.S. Immigration and Customs Enforcement Jon Feere, current USCIS official and former member of the White House's Domestic Policy Council John Zadrozny, former Kansas Secretary of State and member of President Trump's transition team Kris Kobach, Senior Policy Advisor Stephen Miller, and Policy Advisor for the "Trump for President" campaign and Ombudsman of USCIS Julie Kirchner, also have past and present ties to anti-immigrant organizations founded by John Tanton and designated as hate groups by the Southern Poverty Law Center, including CIS and the Federation for American Immigration Reform ("FAIR").[94]

216. President Trump's principal advisor on immigration policy, Senior Policy Advisor Stephen Miller, has asserted that the United States' current immigration system "cost[s] taxpayers enormously because roughly half of immigrant head[s] of households in the

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92 *Trump: I'll Fix Welfare System that Helps Illegal Immigrants More than Americans*, Fox News Insider (May 11, 2016), http://insider.foxnews.com/2016/05/11/trump-rips-welfaresystem-gives-illegal-immigrants-more-americans

93 Andrew O'Reilly, *At GOP debate, Trump says 'stupid' U.S. leaders are being duped by Mexico*, Fox News, (Aug. 6, 2015), https://www.foxnews.com/politics/at-gop-debate-trump-says-stupid-u-s-leaders-are-being-duped-by-mexico.

94 Southern Poverty Law Center, *Federation for American Immigration Reform* (2019), https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform.

United States receive some type of welfare benefit," and that "a recent study said that as much as $300 billion a year may be lost as a result of our current immigration system in terms of folks drawing more public benefits than they're paying in."[95] These statements are apparently based on misleading assertions by CIS, which do not distinguish between immigrants exempt from public charge determinations, other non-LPRs, LPRs, U.S. citizen children of noncitizens, and naturalized citizens.

217. Miller has taken an active role in agency processes focused on furthering the Trump Administration's anti-immigrant policies, including the Rule. For example, when he discovered that an agency had drafted a report describing the benefits of refugees to the economy, he "swiftly intervened," and the report was "shelved in favor of a three-page list of all the federal assistance programs that refugees used."[96] He has baselessly blamed immigrants who enter from the southern border for "thousands" of American deaths annually.[97]

218. Miller has specifically focused on expanding the definition of public charge, even directing federal agencies to "prioritize" this matter over their "other efforts."[98] Miller's drive to push the Rule and other anti-immigration policies ahead despite opposition from officials who questioned their legality, practicability, or reasonability, was reported to be one of the primary reasons why former Secretary Nielsen was forced to resign, along with

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95 The White House, *Press Briefing by Press Secretary Sarah Sanders and Senior Policy Advisor Stephen Miller* (Aug. 2, 2017), https://www.whitehouse.gov/briefings-statements/pressbriefing-press-secretary-sarah-sanders-senior-policy-advisor-stephen-miller-080217/.

96 Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?_r=0.

97 *See* Glenn Kessler, *Stephen Miller's claim that 'thousands of Americans die year after year' from illegal immigration*, Wash. Post (Feb. 21, 2019), https://www.washingtonpost.com/politics/2019/02/21/stephen-millers-claim-that-thousand-americans-die-year-after-year-illegal-immigration/?utm_term=.299854358dbc.

98 Tal Kopan, *Sources: Stephen Miller Pushing Policy to Make It Harder for Immigrants Who Received Benefits to Earn Citizenship*, CNN (Aug. 7, 2018), https://www.cnn.com/2018/08/07/politics/stephen-miller-immigrants-penalizebenefits/index.html.

other officials at DHS.[99] Miller reportedly exerted pressure to force the resignation of USCIS Director Cissna because of the perceived lack of urgency in finalizing the Rule, which Miller predicted would be "transformative."[100] During a meeting with administration officials in March 2019, Miller reportedly became furious that the public charge rule was not yet finished, shouting: "You ought to be working on this regulation all day every day . . . It should be the first thought you have when you wake up. And it should be the last thought you have before you go to bed. And sometimes you shouldn't go to bed."[101] Emails obtained through a FOIA request show Miller berating Cissna in June 2018 over the perceived delay in publishing the proposed public charge rule, with Miller writing "I don't care what you need to do to finish it on time."[102]

219. Other senior officials have similarly expressed animus against nonwhite immigrants. Former Chief of Staff and Secretary of Homeland Security John Kelly has called Haitians "welfare recipients," and, during the weeks leading up to the withdrawal of TPS to Haitians, solicited data regarding the TPS beneficiaries' use of public and private assistance.[103] Kelly also took a leadership role in formulating and promoting the family separation policy formally implemented by DHS in 2018, at several points denying that taking mostly Central

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99 *See* Eileen Sullivan & Michael D. Shear, *Trump Sees an Obstacle to Getting His Way on Immigration: His Own Officials*, N.Y. Times (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/us/politics/trump-immigration-stephen-miller.html?action=click&module=Top%20Stories&pgtype=Homepage.

100 *See id.*

101 *Id.*

102 Ted Hesson, *Emails show Stephen Miller pressed hard to limit green cards*, Politico (Aug. 2, 2019), https://www.politico.com/story/2019/08/02/stephen-miller-green-card-immigration-1630406.

103 Patricia Hurtado, *As the Wall Consumes Washington, Another Immigrant Drama Unfolds in Brooklyn*, Bloomberg (Jan. 11, 2019), https://www.bloomberg.com/news/articles/2019-01-11/as-wall-consumes-washington-another-immigrant-drama-in-brooklyn.

American children from their parents at the border was "cruel" and casually adding that separated children would be placed in "foster care or whatever."[104]

D. President Trump and Other White House Officials Have Expressed Hostility Toward Family-Based Immigration, Which is Primarily Utilized by Immigrants from Predominantly Nonwhite Countries

220. President Trump has also repeatedly spoken about his disdain for family-based immigration preferences. The primary beneficiaries of family-based immigration preferences are individuals from predominantly nonwhite countries, with the most applicants originating in Mexico, China, Cuba, India and the Dominican Republic.[105]

221. President Trump has referred to family-based immigration with the derogatory term "chain migration," repeatedly calling it a "disaster" and falsely claiming that it allows citizens to bring in relatives who are "15 times removed."[106] He has associated family-based immigration preferences with terrorism, using discrete events to launch into attacks on what he calls the "sick, demented" statutory scheme that has been in place for decades. He has called immigrants who arrive pursuant to family preferences "the opposite of [origin countries'] finest," "truly EVIL," and "not the people that we want."[107]

222. President Trump strongly supported the RAISE Act, a bill introduced in the Senate which seeks to reduce the number of green cards issued by more than 50 percent.

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[104] Matthew Yglesias, *Cruelty is the Defining Characteristic of Donald Trump's Politics and Policy*, Vox (May 14, 2018), https://www.vox.com/policy-and-politics/2018/5/14/17346904/john-kelly-foster-care-cruelty-judith-shklar.

[105] Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute, https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states (last updated July 10, 2019).

[106] Meghan Keneally, *8 Times Trump Slammed "Chain Migration" Before It Apparently Helped His Wife's Parents Become Citizens*, ABC News (Aug. 10, 2018), https://abcnews.go.com/US/times-trump-slammed-chain-migration-apparently-helped-wifes/story?id=57132429.

[107] Jessica Kwong, *Donald Trump Says 'Chain Migration' Immigrants 'Are Not the People That We Want'—That Includes Melania's Parents*, Newsweek (Jan. 14, 2019), https://www.newsweek.com/donald-trump-chain-migration-immigrants-melania-1291210.

The bill would create a so-called "merit-based" immigration system that would reduce admissions based on family ties to current citizens or LPRs,[108] The bill obtained only two sponsors in the Senate.

E. Anti-Immigrant Animus of Defendants Cuccinelli and McAleenan and Other Top Officials at DHS and USCIS

223. This hostility towards nonwhite immigrants was and is shared by high-level officials at DHS and USCIS, including defendant Cuccinelli; former USCIS Director Cissna, who promulgated the proposed rule and oversaw much of the public comment and review before he was abruptly forced out of office in June 2019; defendant McAleenan; and former DHS Secretary Kirstjen Nielsen, who oversaw the Department when it first proposed this Rule.

224. Acting USCIS Director Cuccinelli assumed his position in July 2019, after the White House forced the resignation of USCIS Director Cissna because it viewed him as too slow in promulgating the Rule.[109] John Zadrozny, a member of the White House Domestic Policy Council previously employed by FAIR, was installed as Cuccinelli's deputy chief of staff.[110]

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[108] David Nakamura, *Trump, GOP Senators Introduce Bill to Slash Legal Immigration Levels*, Wash. Post (Aug. 3, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/08/02/trump-gop-senators-to-introduce-bill-to-slash-legal-immigration-levels/.

[109] Molly O'Toole et al., *Trump Aide Stephen Miller 'Going to Clean House' as Immigration Policy Hardens*, Los Angeles Times (April 8, 2019), https://www.latimes.com/politics/la-na-pol-trump-nielsen-tougher-border-immigration-whats-next-20190408-story.html. The unusual process for appointing Cuccinelli circumvented the Federal Vacancies Reform Act, which requires the Director of USCIS officials to be drawn from the deputy ranks within the federal agency. Instead, after firing Cissna, President Trump ordered the creation a new deputy position for Cuccinelli, and then promoted him to Acting Director of USCIS, a position for which he was reported to be unlikely to win Senate confirmation. *See* Louise Radnofsky, *High Turnover Roils Trump's Immigration Policy Ranks*, The Wall Street Journal (June 12, 2019), https://www.wsj.com/articles/high-turnover-roils-trumps-immigration-policy-ranks-11560355978.

[110] Rebecca Rainey, *More Moves at USCIS*, Politico (June 14, 2019), https://www.politico.com/newsletters/morning-shift/2019/06/14/more-moves-at-uscis-655114.

225. Cuccinelli is an immigration restrictionist who has advocated for the end of birthright citizenship for children of immigrants, compared immigrants to "rats" and "pests," and who founded State Legislators for Legal Immigration, a nativist group formed to advocate for immigration and public benefits restrictions.[111] Since at least 2007, Cucinnelli (echoing the President's rhetoric) has repeatedly described the United States as being "invaded" by immigrants along the Southern border.[112]

226. In 2008, when Cuccinelli was a state senator in Virginia, he introduced legislation that would have allowed employers to fire those who did not speak English in the workplace. Under his plan, those fired would have subsequently been ineligible for unemployment benefits. One of Cuccinelli's colleagues in the Virginia Senate called it "the most mean-spirited piece of legislation I have seen in my 30 years."[113]

227. Cuccinelli announced the finalization of the Rule in a press briefing on August 12, 2019, stating that the rule would "reshape" the system of obtaining lawful permanent residence.[114] Asked on television the next day whether the poem inscribed on the Statute of Liberty—"give us your tired, your poor, your huddled masses yearning to breathe

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111 Jessica Cobain, *The Anti-Immigrant Extremists in Charge of the U.S. Immigration System*, Center for American Progress (June 24, 2019), https://www.americanprogress.org/issues/immigration/news/2019/06/24/471398/anti-immigrant-extremists-charge-u-s-immigration-system/

112 Andrew Kaczynski, *Trump Official Has Talked About Undocumented Immigrants as 'Invaders' Since at Least 2007*, CNN (Aug. 17, 2019 9:00 AM), https://www.cnn.com/2019/08/17/politics/kfile-ken-cuccinelli-immigration-invasion-rhetoric/index.html.

113 Elaina Plott, *The New Stephen Miller*, The Atlantic (Aug. 14, 2019), https://www.theatlantic.com/politics/archive/2019/08/who-is-ken-cuccinelli/596083/?utm_source=feed.

114 Kadia Tubmanm *The Trump Administration Ties Green Cards and Citizenship to Public Assistance*, Yahoo News (Aug. 12, 2019), https://news.yahoo.com/trump-administration-ties-green-cards-and-citizenship-to-public-assistance-202741361.html.

free"—represented "what America stands for," Cuccinelli responded that the poem was addressed to "people coming from Europe."[115]

228. Former Director Cissna was similarly consistent about his hostility to immigrants. During his oversight of the development and promulgation of the Rule, he repeatedly condemned the family preferences system. Like Trump, Cissna referred to family-based immigration to it with the derogatory phrase "chain migration," and associated incidents of crime or terrorism with the INA's mandate to unify families. For example, in a press conference at the White House, Cissna used a pipe bomb attack by a Bangladeshi immigrant to make a speech criticizing family-based preferences as "not the way that we should be running our immigration system" and claiming to be unaware of data demonstrating that immigrants have a lower rate of crime than U.S.-born citizens.[116] Cissna oversaw the decision to close all 23 of USCIS's international offices—which handle, among other things, citizenship applications, family visa applications, international adoptions, and refugee processing.[117]

229. Under Cissna, Ian M. Smith, a policy analyst with ties to neo-Nazi groups, helped draft the Rule. Smith resigned in August 2018, just two months before the publication of the NPRM, when these neo-Nazi ties became publicly exposed.[118]

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[115] Baragona, *Ken Cucinelli: Statue of Liberty Poem Was About 'People Coming From Europe'*, Daily Beast (Aug. 13, 2019), https://www.thedailybeast.com/ken-cuccinelli-statue-of-liberty-poem-was-about-people-coming-from-europe.

[116] White House, *Press Briefing by Press Secretary Sarah Sanders* (Dec. 12, 2017), https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-121217/.

[117] Hamed Aleaziz, *The Trump Administration Has Set Projected Dates For Closing Foreign Immigration Offices*, Buzzfeed News (Apr. 19, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/trump-administration-overseas-immigration-offices; *Tracking USCIS International Field Office Closures*, American Immigration Lawyers Association (Aug. 15, 2019), https://www.aila.org/infonet/uscis-to-close-all-international-offices-by-2020.

[118] Nick Miroff, *Homeland Security Staffer with White Nationalist Ties Attended White House Policy Meetings*, The Washington Post (Aug.30, 2018), https://www.washingtonpost.com/world/national-security/homeland-security-staffer-with-white-nationalist-ties-attended-white-house-policy-meetings/2018/08/30/7fcb0212-abab-11e8-8a0c-70b618c98d3c_story.html?utm_term=.a461d9bc633b.

230. Both Acting Secretary McAleenan in his role as Commissioner for U.S. Customs and Border Protection and Former Secretary Nielsen shared President Trump's animus towards immigrants and sought to implement his anti-immigrant policies, including the public charge rule. Both have defended the Trump Administration's policy of separating immigrant children at the border, largely Central Americans and Mexicans, from their families, a widely excoriated policy that resulted in the separation of as many as 6,000 children from their parents.[119] McAleenan was one of three officials to support the family separation policy, which continues today despite class action litigation and official claims that it has ceased.

231. In McAleenan's role at CBP, he oversaw an agency accused of rampant abuses of nonwhite immigrants, where numerous agents have assaulted or killed immigrants at the border. CBP agents have stated in court filings that the use of ethnic and racial slurs and the articulation in writing of violent urges toward migrants is "part of agency culture."[120] McAleenan led CBP during a period of years when up to 10,000 agents participated in a Facebook group rife with deeply offensive racist, sexist, and homophobic commentary.[121] McAleenen and other high officials at CBP were aware of the nature of the group, but did not shut it down.[122] On McAleenan's watch, five Guatemalan children have died in CBP custody in the past six months, Central American migrants at the border have been tear-gassed, and families have been forced to sleep outside in the dirt because of CBP refusals to process their

[119] Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Families Despite Rollback of Policy*, N.Y. Times (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html.

[120] Tim Elfrak, *Mindless Murderous Savages: Border Agent Used Slurs Before Hitting Migrant With His Truck*, Wash. Post (May 20, 2019), https://www.washingtonpost.com/nation/2019/05/20/mindless-murdering-savages-border-agent-used-slurs-before-allegedly-hitting-migrant-with-his-truck/.

[121] A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes.

[122] Ted Hesson & Cristiano Lima, *Border Agency Knew About Secret Facebook Group for Years*, Politico (July 3, 2019), https://www.politico.com/story/2019/07/03/border-agency-secret-facebook-group-1569572.

requests for asylum. McAleenan also oversaw CBP during the implementation of the first and second "Muslim bans," which were struck down by appellate courts across the country for violation of the equal protection clause. (A revised third ban eventually survived Supreme Court review.)

232. The unusual sudden purges of high-level officials at DHS in the spring of 2019 reflect President Trump's desire to move immigration policy in a "tougher direction."[123] These firings sent unmistakable signals to current officials that speedy action, regardless of potential legal vulnerabilities, was encouraged and even required.

233. Multiple courts adjudicating claims over the Trump Administration's immigration policies have concluded that "even if the DHS Secretary or Acting Secretary did not 'personally harbor animus . . . , their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decisionmaking process.'"[124] Another court adjudicated the specific question of whether "statements by Trump . . . [can] be imputed to [DHS Deputy Secretary] Duke or Nielsen." It ruled in the affirmative, finding that statements from "people plausibly alleged to be involved in the

[123] John Fritze & Alan Gomez, *Trump to Name Ken Cuccinelli to Immigration Job as White House Seeks 'Tougher Direction'*, USA Today (May 21, 2019), https://www.usatoday.com/story/news/politics/2019/05/21/donald-trump-ken-cuccinelli-take-job-homeland-security/3750660002/.

[124] *Ramos* v. *Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018); *see also CASA de Maryland, Inc.* v. *Trump*, 355 F. Supp. 3d 307, 326 (D. Md. 2018) ("Defendants contend that the Secretary was the decision-maker, not the President, and that the Secretary's decision did not involve classification of a group of foreign nationals on the basis of their individual characteristics, but rather the classification of a foreign state. As to the first of these contentions, there can be no doubt that if, as alleged, the President influenced the decision to terminate El Salvador's TPS, the discriminatory motivation cannot be laundered through the Secretary."); *Centro Presente* v. *U.S. Dep't of Homeland Security*, 332 F. Supp. 3d 393, 414–15 (D. Mass. 2018) ("Defendants argue that the allegations regarding statements by Trump are irrelevant because animus held by the President cannot be imputed to Duke or Nielsen, the two officials who terminated the TPS designations at issue, notwithstanding allegations that the White House was closely monitoring decisions regarding TPS designations. . . . [B]ecause the exact time that the new policy regarding the criteria for TPS designations was made and the exact participants involved in that decision are unclear, it would be premature to conclude that President Trump had nothing to do with that decision such that his statements would be irrelevant.").

decision-making process, and an allegedly unreasoned shift in policy [are] sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision."[125]

234. Courts have looked at facts such as these and found that the Trump Administration's actions can plausibly be traced to the President's personal anti-immigrant animus. For example, Judge Furman of this Court recently held that statements and actions by the President render "plausible" plaintiffs' allegation that Administration action in adding citizenship questions to the upcoming census was motivated by unconstitutional animus.[126] Likewise, Judge Garaufis of the Eastern District of New York recently held that President Trump's statements about immigrants were "racially charged, recurring, and troubling" enough to raise "a plausible inference that the DACA rescission was substantially motivated by unlawful discriminatory purpose."[127] The Ninth Circuit affirmed a district court's similar finding, considering not only Trump's "pre-presidential" and "post-presidential" statements, but also the "unusual history" of that agency action and the evidence of the disparate impact it would have on "Latinos and persons of Mexican heritage."[128] And in litigation over President Trump's travel ban, the Fourth Circuit found that the relevant executive order "sp[oke] in vague words of national security," but still facially "drip[ped] with religious intolerance, animus, and discrimination."[129]

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125 *Centro Presente*, 332 F. Supp. 3d at 415.

126 *State of New York* v. *United States Dep't of Commerce, et al.*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (Furman, J.).

127 *Batalla Vidal* v. *Nielsen*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018).

128 *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Security*, 908 F.3d 476, 518–20 (9th Cir. 2018).

129 *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (en banc), *vacated as moot without expressing a view on the merits*, 138 S. Ct. 353 (2017); *see also Int'l Refugee Assistance Project* v. *Trump*, 241 F. Supp. 3d 539, 558–59 (D. Md. 2017) (finding the same at the district court: "[D]irect statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban."); *Hawai'i* v. *Trump*, 245 F. Supp. 3d 1227, 1236 (D. Haw. 2017) ("[H]ere the historical context and the specific sequence of events leading up to the adoption of the challenged

F. As Intended, the Rule Disproportionately Affects Immigrants from Nonwhite Countries

235. The Rule will also have a disproportionate effect on nonwhite immigrants. Evidence submitted to DHS as part of its notice-and-comment process showed that the Rule's most heavily weighted positive factor, an income of at least 250 percent of the FPG, is unlikely to be met by 71 percent of applicants from Mexico and Central America, 69 percent from Africa, 75 percent from the Philippines, and 63 percent from China; by comparison, only 36 percent of applicants from Europe, Canada, and Oceania who will be unlikely to meet this threshold.[130]

236. Another comment on the proposed rule estimated, for every country in the world, the percentage of the population that would be assigned a "negative factor" under the Rule due to having a family income below 125 percent of the FPG.[131] The results confirm that the "125 percent test will disproportionately affect immigrants from poor countries and have a racially disparate impact on who is allowed into the U.S."[132] For example, 99.2 percent of the population of South Asia, 98.5 percent of the population of Sub-Saharan Africa, and 79.1 percent of the population of Latin America and the Caribbean would fall below the 125 percent

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Executive Order are as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context." (internal quotation marks omitted)).

130 Jeanne Batalova et al., *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, Migration Policy Institute (Aug. 2018), https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule. This study was referenced in numerous public comments, including, *e.g.*, those submitted by the National Hispanic Leadership Agenda, and the Service Employees International Union. *See also* Legal Aid Justice Center, Comment, at 8 (Dec. 10, 2018) (citing Boundless Immigration Inc., *Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year* (Sept. 24, 2018), https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/ (citing the same figures)).

131 CBPP Comment at 11–17 & Table 2.

132 *Id.* at 12.

threshold. By contrast, less than 10 percent of the populations of countries like Norway, Germany, and France fall below the threshold.[133]

237. The Rule's standardless requirement that applicants obtain "English language proficiency" will similarly have a disproportionate impact on immigrants from Latin American countries.

238. The Rule is arbitrary and capricious because it arbitrarily discriminates against immigrants of color.

239. The Rule is also arbitrary and capricious because it is pretextual. The Rule purports to identify immigrants who will become public charges, but the factors that it adopts as part of the Rule bear no reasonable relationship to the public charge inquiry. This demonstrates that defendants were seeking to reduce immigration by immigrants of color.

IX. The Rule Will Cause Irreparable Harm to Immigrant Families, the Public, and Plaintiffs

240. The Rule will cause irreparable harm to hundreds of thousands or millions of immigrants by penalizing them for past or anticipated future use of benefits to which they are legally entitled. Individuals receive these benefits during the most vulnerable times in their lives. Effectively forcing individuals to forego benefits so as to protect their immigration statuses will have broad negative repercussions on the health and safety of noncitizens, and will impede their integration into American society. The Rule itself acknowledges massive impacts on society at large, including public health, the economy, and workforce. The Rule will also impede the fundamental missions of plaintiffs, and will force them to divert resources to support their clients, members, and the public in dealing with the fallout from the Rule.

[133] *See id.* at 12–13.

A. Harms to Immigrant Families

241. As DHS concedes, the Rule will cause a flight of immigrants away from benefits to which they are lawfully entitled and that are not currently part of the public charge analysis, including benefits for healthcare, nutrition, and housing. Some of this will occur because immigrants will correctly conclude that the benefits will harm their ability to achieve LPR status. In other cases, it will occur because of understandable and predictable fear and confusion, abetted by the complexity of the Rule and the Administration's consistently expressed hostility to immigration and immigrants, as discussed above. In all such cases, the loss of such benefits will cause irreparable harm to immigrant households across the country.

242. DHS concedes the existence of these chilling effects, but grossly understates their severity. While acknowledging that it is "difficult to predict" the Rule's chilling effect on noncitizens, 84 Fed. Reg. at 41,313, DHS estimates that about 2.5 percent of public benefits recipients who are members of households including foreign-born noncitizens—or approximately 232,288 individuals—will forego benefits to which they are legally entitled every year.[134] DHS further estimates that, as a result, these individuals will lose nearly $1.5 billion in federal benefits payments, and more than $1 billion in state benefits payments, ever year.[135] DHS estimates that these numbers could be higher in the first year the Rule is in effect, causing as many as 725,760 individuals to disenroll from benefits programs, and denying them access to as much as $4.37 billion in federal benefits that year alone.[136]

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134 *See* DHS, Economic Analysis Supplemental Information for Analysis of Public Benefits Programs, at 7 & Table 5, https://www.regulations.gov/document?D=USCIS-2010-0012-63742.

135 *See id.*; Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, at 10–11 & Table 1, https://www.regulations.gov/document?D=USCIS-2010-0012-63741 [hereinafter "Regulatory Impact Analysis"].

136 *See* Regulatory Impact Analysis, at 98–99 & Table 18.

243. These DHS estimates are not based on any data of actual disenrollment. Instead, they are based on DHS's estimate of the average percentage of immigrants (out of the total population of foreign-born noncitizens in the United States who receive any of the specified benefits) who adjust status every year. *See* 83 Fed. Reg. at 51,266. DHS thus rests its conclusion on the unsupported assumption that only immigrants who intend to apply for status adjustment will forego public benefits as a result of the Rule, and that they will do so only in the year in which they intend to make such an application.

244. DHS's assumptions are unwarranted, and its conclusions grossly understate the Rule's chilling effects, as evidenced by comments provided to DHS on the proposed rule. A study conducted by the Migration Policy Institute, based upon data showing the effects of reducing noncitizen access to public benefit programs under PRWORA, has estimated that, as a result of the rule in the form proposed in the NPRM, "5.4 million to 16.2 million of the total 27 million immigrants and their U.S.- and foreign-born children in benefits-receiving families could be expected to disenroll from programs."[137] The nonpartisan Fiscal Policy Institute estimated that "the chilling effect [of the proposed rule] would extend to 24 million people in the United States, including 9 million children under 18 years old."[138] Similarly, Manatt Health estimated that "[n]ationwide, 22.2 million noncitizens and a total of

[137] Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, Migration Policy Institute, at 4 (June 2018), https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families. This study was referenced in numerous public comments, including, *e.g.*, those of the Southern Poverty Law Center, the Alabama Coalition for Immigrant Justice, the Coalition of Florida Farmworker Organizations, the Farmworker Association of Florida, the Florida Immigrant Coalition, the Hispanic Interest Coalition of Alabama, the MQVN Community Development Corporation, and the Southeast Immigrant Rights Network, and the Center for Law and Social Policy.

[138] Fiscal Policy Institute, *FPI Estimates Human & Economic Impacts of Public Charge Rule: 24 Million Would Experience Chilling Effects*, (Oct. 10, 2018), http://fiscalpolicy.org/public-charge. This study was referenced in public comments, including, *e.g.*, those of Advancement Project California, and the Community Legal Center.

41.1 million noncitizens and their family members currently living in the United States (12.7% of the total U.S. population) could potentially be impacted as a result of the proposed changes in public charge policy."[139] More recently, a study published by the Journal of the American Medical Association estimated that the proposed Rule "is likely to cause parents to disenroll between 0.8 million and 1.9 million children with specific medical needs from health and nutrition benefits."[140] Certain of these estimates are more than 50 times greater than DHS's estimates. DHS does not contend (and certainly offers no reason to believe) that the modest changes made in the final Rule will ameliorate this harm.

245. The chilling effects of the Rule are already well documented and have been observed by the organizational plaintiffs among their clients and constituencies—and, again, were called to DHS's attention in comments on the proposed rule. Following the leak of President Trump's draft Executive Order in January 2017 and early drafts of the Rule in February and March 2018, many immigrants and their families chose to forego participation in federal, state, and local benefits to avoid being labeled public charges. For example, just months after the first leaks of the executive order, a Los Angeles-based health care provider serving a largely Latino community reported a 20 percent drop in SNAP enrollment and a 54 percent drop in Medicaid enrollment among children, as well as an overall 40 percent decline in program re-enrollments.[141] In late 2017, benefits administrators continued to see declining

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[139] Manatt Health, *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard* (Oct. 11, 2018), https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population. This study was referenced in public comments, including, *e.g.*, those of the American Civil Liberties Union, and Loyola University Chicago's Center for the Human Rights of Children.

[140] Leah Zallman et al., *Implications of Changing Public Charge Immigration Rules for Children Who Need Medical Care*, JAMA Pediatrics (July 1, 2019), https://jamanetwork.com/journals/jamapediatrics/article-abstract/2737098.

[141] CBPP Comment at 59 (citing Annie Lowrey, *Trump's Anti-Immigrant Policies Are Scaring Eligible Families Away from the Safety Net*, The Atlantic (Mar. 24, 2017), https://www.theatlantic.com/business/archive/2017/03/trump-safety-net-latino-families/520779/).

program participation over the prior year, including an 8.1 percent decrease in New Jersey SNAP programs, a 9.6 percent decrease in Florida WIC participation, and a 7.4 percent decrease in Texas WIC participation.[142] By September 2018, WIC agencies in at least 18 states reported drops of up to 20 percent in enrollment, a change they attributed "to fears about the [public charge] immigration policy."[143] A study released in November 2018 found that participation in SNAP "dropped by nearly 10 percentage points in the first half of 2018 for immigrant households that are eligible for the program and have been in the United States less than five years."[144] For the period from January 2018 through January 2019, New York City found a 10.9 percent drop in non-citizens leaving the SNAP caseload or deciding not to enroll, compared to a 2.8 percent drop among citizens.[145] Even more recently, a survey by the Urban Institute found that in 2018—before the NPRM was published, but after extensive reporting that it was under consideration—***one in seven adults*** in immigrant families reported that they or a family member had disenrolled from or chosen not to apply for a noncash benefit program "for fear of risking green card status."[146] Another study published by the Urban Institute in

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142 CBPP Comment at 60 (citing Emily Bumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services*, N.Y. Times (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html).

143 CBPP Comment at 60 (citing Helena Bottemiller Evich, *Immigrants, Fearing Trump Crackdown, Drop out of Nutrition Programs*, Politico (Sept. 4, 2018), https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292).

144 Helena Bottemiller Evich, *Immigrant Families Appear to Be Dropping out of Food Stamps*, Politico (Nov. 14, 2018), https://www.politico.com/story/2018/11/14/immigrant-families-dropping-out-food-stamps-966256. This article was cited by several commenters, including, *e.g.*, the City of Chicago, and 111 Members of Congress led by Reps. Jerrold Nadler, Zoe Lofgren, and Adriano Espaillat. *See also* Allison Bovell-Ammon, et al., *Trends in Food Insecurity and SNAP Participation Among Immigrant Families of U.S.-Born Young Children*, Children's Healthwatch, at 1 (Apr. 4, 2019) (finding that "SNAP participation decreased in all immigrant families in 2018, but most markedly in more recent immigrants, while employment rates were unchanged").

145 N.Y.C. Dep't of Social Servs., *Fact Sheet: SNAP Enrollment Trends in New York City* (June 2019), https://www1.nyc.gov/assets/immigrants/downloads/pdf/Fact-Sheet-June-2019.pdf.

146 Hamutal Bernstein et al., *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, Urban Institute, at 2 (May 22, 2019), https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_7.pdf.

August 2019 showed that numerous adults in immigrant families have avoided participating in SNAP, Medicaid, and housing benefits due to fear and confusion about the public charge rule.[147] This effect will only become more pronounced with the publication of the final Rule.

246. DHS acknowledges, but does not quantify, other dire harms to immigrants, their families, and their communities that will result when noncitizens forego benefits to avoid harming their immigration status. These include:

- "Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated;
- Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient; and
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment."

83 Fed. Reg. at 51,270. DHS further acknowledges the possibility that ***not*** adopting the Rule might "alleviate food and housing insecurity, improve public health, decrease costs to states and localities, [and] better guarantee health care provider reimbursements." 84 Fed. Reg. at 41,314. But it apparently views these consequences as an acceptable cost of its stated goal of furthering immigrant "self-sufficiency."

247. Here, too, DHS understates the severe harms in the form of food insecurity, worse health, and homelessness that have been, are being, and will be suffered by immigrants, their children (including U.S. citizen children), and other family members—harms that, once again, many commenters to the NPRM called to DHS's attention.

[147] Hamutal Bernstein et al., *Safety Net Access in the Context of the Public Charge Rule: Voices of Immigrant Families*, Urban Institute (Aug. 7, 2019), https://www.urban.org/sites/default/files/publication/100754/safety_net_access_in_the_context_of_the_public_charge_rule_1.pdf.

248. Going without SNAP will increase food insecurity, which leads to adverse health impacts and increased spending on medical care.[148] Studies show that participation in SNAP for six months reduced the percentage of SNAP households that were food insecure by 6–17 percent, reducing obesity, improving dietary intake, and contributing to more positive overall health outcomes.[149] According to one estimate, SNAP decreases annual healthcare expenditures by an average of $1,409 per participant as compared to non-participants.[150]

249. Similarly, declines in Medicaid participation will restrict access to medical care and increase the rates of uninsured persons, negatively impacting the health of already strained communities.[151] Medicaid significantly increases access to health care, leading to better composite health scores, lower incidences of high blood pressure, fewer emergency room visits, and reduced hospitalizations.[152] The positive effects of Medicaid go beyond just health. For example, Medicaid (including CHIP) has been shown to reduce childhood poverty rates by 5.3 percentage points.[153]

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148 *See* CLASP Comment at 32; CBPP Comment at 61–62.

149 Institute for Policy Integrity at New York University School of Law, Comment, at 10 (Dec. 10, 2018) (citing Food Research & Action Center, *The Role of the Supplemental Nutrition Assistance Program in Improving Health and Well-Being*, at 5 (Dec. 2007), https://frac.org/wp-content/uploads/hunger-health-role-snap-improving-health-well-being.pdf).

150 Food Research & Action Center, *The Role of the Supplemental Nutrition Assistance Program in Improving Health and Well-Being*, at 7 (Dec. 2017), https://frac.org/wp-content/uploads/hunger-health-role-snap-improving-health-well-being.pdf (cited in Institute for Policy Integrity at New York University School of Law, Comment, at 10 (Dec. 10, 2018)).

151 *See* CLASP Comment at 33; CBPP Comment at 62–64.

152 CLASP Comment at 33 (citing Alisa Chester & Joan Alker, *Medicaid at 50: A Look at the Long-Term Benefits of Childhood Medicaid,* Georgetown Univ. Health Policy Inst. Ctr. for Children and Families (2015), https://ccf.georgetown.edu/wpcontent/uploads/2015/08/Medicaid-at-50_final.pdf; Sarah Miller & Laura R. Wherry, *The Long-Term Effects of Early Life Medicaid Coverage,* SSRN Working Paper (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466691).

153 Loyola University Chicago's Center for the Human Rights of Children, Comment, at 5 (citing Dahlia Remler, et al., *Estimating the Effects of Health Insurance and Other Social Programs on Poverty Under the Affordable Care Act*, Health Affairs (Oct. 2017), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0331).

250. Going without rental assistance will increase homelessness and housing instability,[154] which lead to a host of individual and societal harms including increased hospital visits, loss of employment, and mental health problems.[155] Current housing assistance lifts about a million children out of poverty each year,[156] leads to significantly higher college attendance rates and higher annual incomes,[157] and improves long-term economic mobility.[158]

251. Children in particular—including U.S.-citizen children of noncitizen parents—will lose access to programs that support healthy development. Numerous studies have found that children who lack these basic needs will feel repercussions throughout their lives, as they perform worse in school and suffer adverse health consequences. For example, housing instability negatively impacts a child's cognitive development, decreases student retention rates, and limits student opportunity.[159] The Robin Hood Foundation found that the proposed rule could increase the number of poor New York City residents by as much as 5 percent.[160] DHS "recognizes that many of the public benefits programs aim to better future

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154 Gregory Mills et al., *Effects of Housing Vouchers on Welfare Families*, U.S. Dep't of Housing and Urban Development, at 139 (2006), https://www.huduser.gov/publications/pdf/hsgvouchers_1_2011.pdf (finding that between 1999 and 2004, housing vouchers reduced the percentage of homeless families living in the streets or in shelters from 7 percent to 5 percent, and the percentage of homeless families living with friends or relatives from 18 percent to 12 percent). This study was referenced in public comments, including, *e.g.*, those submitted by the Institute for Policy Integrity at New York University School of Law, and Loyola University Chicago's Center for the Human Rights of Children.

155 National Housing Law Project, Comment, at 4 (Dec. 10, 2018) (citing Will Fischer, *Research Shows Housing Vouchers Reduce Hardship and Provide Platform for Long-Term Gains Among Children*, Center on Budget & Policy Priorities (Oct. 7, 2015), https://www.cbpp.org/research/researchshows-housing-vouchers-reduce-hardship-and-provide-platform-for-lon gterm-gains); CBPP Comment at 64–65.

156 Trudi Renwick & Liana Fox, *The Supplemental Poverty Measure: 2016*, U.S. Census Bureau (Sept. 2017). This study was referenced in numerous public comments, including, *e.g.*, those submitted by Michigan Immigrant Rights Center, the Massachusetts Law Reform Institute, the Disability Law Center, and the National Housing Law Project.

157 CLASP Comment at 34 (citing Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: new Evidence from the Moving to Opportunity Experiment*, Am. Econ. Rev. 855 (2016)).

158 National Housing Law Project, Comment, at 8 (Dec. 10, 2018).

159 *Id.* at 9.

160 Christopher Wimer et al., *Public Charge: How a New Policy Could Affect Poverty in New York City*, Robin Hood (Dec. 2018), https://robinhoodorg-

economic and health outcomes" for children, *see* 84 Fed. Reg. at 41,371, but makes no effort to address the impact that the loss of benefits will have on the well-being of children both now and in the future.

252. DHS similarly acknowledges the severe harm from the Rule to vulnerable populations, but, again, does nothing to ameliorate these harms. Women, persons with disabilities, persons with HIV/AIDS, and elderly individuals all use benefits programs at higher than average rates.[161] These categories of people, then, particularly stand to suffer if they are unable to access benefits due to operation of the Rule, as several commenters pointed out.[162]

253. Finally, the Rule will harm immigrants and their families by depriving them of the ability to remain in this country and keep their families together. DHS is aware of this harm, too, but makes no effort to address it. On the contrary, Rule is designed to affect primarily family-based immigrants.

254. DHS acknowledges a chilling effect on "people who erroneously believe themselves to be affected" and therefore forego public benefits due to fear or confusion about the Rule's scope, but blandly responds that it "will not alter this rule to account for [the]

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production.s3.amazonaws.com/uploads/2018/12/Public_Charge_Report_FINAL-4.pdf. This study was cited in several public comments, including, *e.g.*, those submitted by Legal Services NYC, and the New York City Comptroller.

161 *See, e.g.,* American Civil Liberties Union, Comment (Dec. 10, 2018).

162 *E.g.*, 84 Fed. Reg. at 41,310–11 ("Some commenters stated that including SNAP in the public charge determination would worsen food insecurity primarily among families with older adults, children, and people with disabilities. . . . Several commenters stated that the sanctions associated with the use of Medicaid and Medicare Part D benefits would result in reduced access to medical care and medications for vulnerable populations, including pregnant women, children, people with disabilities, and the elderly. . . . Many commenters said that reduced enrollment in federal assistance programs would most negatively affect vulnerable populations, including people with disabilities, the elderly, children, survivors of sexual and domestic abuse, and pregnant women. . . . Several commenters said the proposed rule would adversely affect immigrant women, because they will be more likely to forego healthcare and suffer worsening health outcomes.")

unwarranted choices" of these individuals. 84 Fed. Reg. at 41,313. DHS does not and cannot contend, however, that all noncitizens who forego benefits in order not to be penalized by the Rule are misinformed and confused. On the contrary, it concedes that discouraging benefits use by noncitizens is precisely one of the Rule's goals. Moreover, in light of the repeated expressions of hostility by members of the Trump Administration to immigrants and immigrants' purported heavy use of public benefits, including not least of all those by President Trump himself, it is difficult to avoid concluding that such confusion was intended. More fundamentally, DHS cannot credibly disclaim responsibility for the damage the Rule will predictably cause by attributing that damage to supposed confusion about the Rule. At the least, the enormously complex nature of the Rule, as discussed above, and the Rule's heavy reliance on subjective assessments by USCIS officers of the "totality of the circumstances," make such confusion inevitable.

B. Harms to the General Public

255. Large numbers of immigrant families foregoing public benefits to which they are entitled will have significant adverse impacts on the national and local economies, state and local governments, and the public generally.

256. DHS acknowledges the significant negative impact the Rule will have "on the economy, innovation, and growth." 84 Fed. Reg. at 41,472. As multiple commenters pointed out, these harms are very large. For example, assuming a 35 percent disenrollment rate—a rate derived from studies of the chilling effect on immigrants of other major policy changes, such as the enactment of PRWORA in 1996—the Fiscal Policy Institute estimates that former public benefits recipients will forego $17.5 billion in public benefits, the lost spending of which would result in the potential loss of 230,000 jobs and $33.8 billion in

potential economic ripple effects.[163] Another study estimated an even more severe economic impact of the rule, explaining: "The total annual income of workers who would be affected by the public charge rule is more than $96.4 billion. Should they leave the United States, our economy would suffer negative indirect economic effects of more than $68 billion dollars. The total cost to the U.S. economy could therefore amount to ***$164.4 billion***" (emphasis added).[164]

257. Health care systems will be particularly affected. Medicaid supports hospitals, health centers, and other community care providers that provide needed medical access to low-income people throughout the United States, not just immigrants. By reducing Medicaid enrollment and effectively limiting immigrants' access to health care, these providers will be negatively impacted and may have to limit their services to all persons. Studies cited in public comments estimated that nearly $17 billion in Medicaid and CHIP hospital payments could be at risk as a result of the chilling effect of the Rule,[165] and that community health centers stood to lose $624 million in Medicaid revenue, resulting in 538,000 fewer patients and a loss of 6,100 medical staff jobs.[166]

258. Similar examples abound. Businesses that accept SNAP benefits, such as grocery stores, will be harmed: they will have to cut back on the foods that they offer to the

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[163] CLASP Comment at 38 (citing Fiscal Policy Institute, *Only Wealthy Immigrants Need Apply: How a Trump Rule's Chilling Effect Will Harm the U.S.*, at 5 (Oct. 10, 2018), http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf).

[164] *See* New American Economy, *How the "Public Charge" Rule Change Could Impact Immigrants and U.S. Economy* (Oct. 31, 2018), https://research.newamericaneconomy.org/report/economic-impact-of-proposed-rule-change-inadmissibility-on-public-charge-grounds/. This study was referenced in public comments, including, *e.g.*, those submitted by the Institute for Policy Integrity at New York University School of Law, and the New American Economy.

[165] *E.g.*, CLASP Comment at 38 (citing Cindy Mann et al., *Medicaid Payments at Risk for Hospitals Under Public Charge*, Manatt Health (Nov. 16 2018), https://www.manatt.com/Insights/White-Papers/2018/Medicaid-Payments-at-Risk-for-Hospitals-Under-Publ).

[166] *E.g.*, CLASP Comment at 38 (citing Leighton Ku et al., *How Could the Public Charge Proposed Rule Affect Community Health Centers?*, RCHN Community Health Foundation Research Collaborative (Nov. 2018), https://publichealth.gwu.edu/sites/default/files/downloads/GGRCHN/Public%20Charge%20Brief.pdf).

entire community, not just immigrants. Moreover, SNAP benefits have a high multiplier effect as they circulate through the economy. Studies have found that every dollar of SNAP translates to roughly $1.79 in local economic activity.[167] Decreasing the use of SNAP benefits deprives entire communities of this multiplier effect.

259. Even utilizing the final rule's inadequate and vastly underestimated 2.5 percent rate of disenrollment or foregone enrollment, DHS estimates that SNAP disenrollment alone will result in $197.8 million in foregone benefit payments, leading to a $354 million decrease in total economic activity, a $51.4 million decrease in retail food expenditures, a $146.3 million decrease in expenditures on nonfood goods and services, and a loss of more than 1,900 jobs.[168] Assuming a far more justifiable higher rate of disenrollment or foregone enrollment, the fallout from SNAP disenrollment will be even more consequential.

C. Harms to Plaintiffs

260. The effects described in the previous sections are already being felt, and will only become more pronounced when the Rule goes into effect on October 15, 2019, unless it is enjoined. Since even before the Rule was published on August 14, 2019, noncitizens increasingly have been forced to grapple with the potential effects of the Rule on their immigration statuses, and have increasingly turned to advocacy organizations for help. As discussed above, *supra* ¶¶ 21–46, plaintiffs are the front-lines for dealing with this well-

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[167] *See* Kenneth Hanson, *The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP*, U.S. Dep't of Agriculture, at iv (Oct. 2010), https://www.ers.usda.gov/webdocs/publications/44748/7996_err103_1_.pdf ("The FANIOM analysis of SNAP expenditures is estimated to increase economic activity (GDP) by $1.79 billion."); *accord* Nune Phillips, *SNAP Contributes to a Strong Economy*, Center for Law and Social Policy (Aug. 2017) ("[E]ach $1 increase in SNAP payments generates $1.73 of economic activity, a fiscal impact greater than any other public benefit program or tax cuts."). Hanson's study for the U.S. Department of Agriculture was referenced in several public comments, including, *e.g.*, those submitted by the Harvard Law School Food Law and Policy Clinic, the National Immigration Law Center, USCIS-2010-0012-39659 and the City and County of San Francisco.

[168] Regulatory Impact Analysis at 104–06.

founded panic, which will continue unless and until the Rule is enjoined. The Rule threatens the mission of each of the plaintiffs, and requires them to devote substantial resources—in money, time, and personnel—that cannot otherwise be devoted to serving their constituents.

261. Plaintiff CCCS-NY operates the New York state and New York City hotlines that answer questions and, where needed, makes emergency referrals for people who may be trying to adjust before October 15, 2019, or may be deciding whether to close their cases or apply for benefits they need, or who may require emergency assistance to deal with the loss of benefits. CCCS-NY's legal team is required to answer urgent questions from noncitizens about the Rule and its implications, and to assist eligible clients in seeking adjustment before the deadline. By prioritizing these cases, CCCS-NY is unable to serve other clients with other serious issues.

262. Plaintiff MRNY is holding emergency meetings and answering questions from clients and members concerned about whether the Rule applies to them. MRNY's staff help its members and other noncitizens navigate the processes of applying for health insurance and SNAP benefits. Since the Rule was announced, these staff have had to spend significant time learning about the new rule; engaging in community education trainings and workshops; and conducting screenings and intakes and answering questions from MRNY's members and the public. In the short time since the Rule was issued on August 14, 2019, MRNY has held eight workshops on public charge, in addition to the approximately 29 workshops held in October and November 2018 after the NPRM was first published. These workshops are in demand and serve hundreds of members, clients, and the public. MRNY will continue to conduct such workshops after October 15, 2019 if the Rule is not enjoined

263. Like CCCS-NY, the legal teams at MRNY and ASC must, by necessity, prioritize adjustments that can be filed before October 15, 2019, so as to protect their clients from being subject to the Rule. Also like CCCS-NY, the MRNY and ASC legal teams are unable to deal with other issues facing their clients due to this need to prioritize muting the effects of the Rule.

264. Plaintiffs CLINIC and AAF are likewise on the receiving end of urgent questions from members and affiliates brought through their clients and constituents. CLINIC's consultation service is already at maximum capacity, unable to address other emergency needs of its affiliates.

265. These harms will be greatly amplified if the Rule is allowed to go into effect on October 15, 2019. Plaintiffs will have to address questions from clients, members of their organizations, and the public who are planning adjustment about how the Rule affects them, and those same clients will require extra assistance when they go forward with an adjustment application. Not only will clients need assistance filling out the burdensome Form I-944, they will need extra counseling to understand fully their options, including not going forward with an application at all. Plaintiffs will also have to assist clients and members with questions about continuing to receive or applying for benefits. Because the consequences of applying for or receiving benefits will be far more dire, tasks that used to be relatively routine will now require plaintiffs' staff to conduct a grueling analysis to attempt to determine whether the application could render the client a public charge.

266. Plaintiffs will need to devote substantial resources to educating their members, constituents, and immigrant communities generally regarding the Rule. For instance, AAF held a special press briefing after the Rule was issued featuring information

provided in seven Asian languages for the benefit both of those present and for consumers of Asian ethnic media generally. MRNY has held eight workshops on public charge since the final rule was announced, bringing the total number of its workshops on public charge since the rule was proposed to over three dozen. Preparing such educational sessions requires plaintiffs to devote time, personnel, and resources that cannot then be spent on addressing other consequential issues facing those same constituencies.

267. Plaintiffs like CCCS-NY and AAF that have access to charity funds also will face extra demands on those resources. Because noncitizens will be unable to access public benefits, they will instead turn to these organizations to help fill the gaps and make ends meet. The plaintiffs will be unable to use these funds for other programs or to address the needs of their other constituents.

268. The Rule goes to the heart of the core mission of each of the plaintiffs. Where plaintiffs seek a world where immigrants have choices and are treated with dignity and respect as they make their way towards permanent residence and greater economic success, the Rule has the opposite effect. In application, the Rule will prevent low-income immigrants of color from applying to adjust, and will limit their choices about accessing benefits that get them through hard times. To address this harm and fulfill their missions, plaintiffs will be forced to devote time, money, personnel, and other resources to this issue.

269. In October 2018, USCIS began a policy of issuing Notices to Appear in immigration court for removal hearings to immigrants whose adjustment of status the agency had denied. Intending immigrants are thus facing not only a higher likelihood of denial of adjustment once the Rule goes into effect, but also, for many, an accompanying risk that such denial will lead to placement in removal proceedings. Implementation of the Rule will thus

force many adjustment applicants and their families to leave the lives they have built and cherished over years in the United States. For Plaintiffs MRNY, ASC, and AAF, these effects will in turn hinder the organizations' ability to mobilize community members and impede their ability to fulfill their mission of strengthening the political voice and well-being of immigrant communities. For all plaintiffs, these effects will cause a substantial increase in resources dedicated to mitigating the harms of the Rule, educating clients about the dangers of adjustment, and evaluating the risks of accessing important health care, nutritional, and housing assistance. And, where the Rule results in denials of adjustment of status, plaintiffs will be forced to spend additional resources counseling individuals through subsequent removal proceedings.

270. The Rule will potentially result in denial of status adjustment to hundreds of thousands of applicants, including the thousands of adjustment applicants who receive representation, counseling, and other immigration-related services from plaintiffs. The Department of State, which processes applicants immigrant visas from abroad, has seen a significant increase in immigrant visa denials on public charge grounds in the year since it implemented a policy change similar to the Rule. That pattern will repeat itself as to applications for adjustment of status if the Rule goes into effect. Implementation of the Rule will lead to immigrants losing their opportunity to adjust, and will threaten families with instability far into the future.

CAUSES OF ACTION

COUNT ONE

(Violation of Administrative Procedure Act – Substantively Arbitrary and Capricious, Abuse of Discretion, Contrary to Constitution or Statute)

271. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

272. The APA, 5 U.S.C. § 706(2), prohibits federal agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

273. DHS and USCIS are each an "agency" under the APA. 5 U.S.C. § 551(A).

274. In implementing the Rule, defendants took unconstitutional and unlawful action, in violation of the APA, by, among other things, as set forth herein: (a) expanding the definition of "public charge" in a manner contrary to the statutory meaning of the term; (b) seeking to establish a framework for making public charge determinations that will deny status adjustment to large numbers of intending immigrants who would be approved for status adjustment under an approach consistent with the Act; (c) identifying "negative factors" and "heavily weighted negative factors" for public charge determinations that are contrary to law; (d) establishing a Rule that is so confusing, vague, and broad that it fails to give applicants notice of the conduct to avoid and inviting arbitrary, subjective, and inconsistent enforcement; (e) seeking to establish a framework for public charge determinations that undermines the Congressional goal of promoting family unity; (f) promulgating a rule that discriminates

against individuals with disabilities in violation of the Rehabilitation Act of 1973;

(g) promulgating a Rule that, in purpose and effect, is improperly retroactive; and

(h) promulgating a rule that is motivated by animus against nonwhite immigrants.

275. Defendants acted arbitrarily and capriciously, otherwise not in accordance with law, and contrary to constitutional right, and abused their discretion, in violation of the APA.

276. Defendants' violations have caused and will continue to cause ongoing harm to plaintiffs and the general public.

COUNT TWO

(Violation of Administrative Procedure Act – Procedurally Arbitrary and Capricious, Notice and Comment)

277. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

278. The APA, 5 U.S.C. §§ 553 and 702(2)(D), prohibits federal agency action that affects substantive rights "without observance of procedure required by law."

279. DHS and USCIS are each an "agency" under the APA. 5 U.S.C. § 551(A).

280. In implementing the Rule, defendants will change the substantive criteria regarding evaluating whether an individual is a public charge.

281. The Rule must comply with the APA process for notice-and-comment rulemaking. 5 U.S.C. § 553.

282. Under the APA, agencies engaged in notice-and-comment rulemaking must, among other things, (a) provide reasonable basis for departing from prior agency actions;

(b) support their actions with appropriate data and evidence; and (c) provide a reasoned response to significant public comments.

283. Defendants have failed to comply with these obligations.

284. These violations will cause ongoing harm to plaintiffs.

COUNT THREE

(Violation of the Administrative Procedure Act – In Excess of Statutory Jurisdiction, Authority, or Limitations)

285. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

286. The APA, 5 U.S.C. § 706(2)(C), prohibits federal agency action that is made "in excess of statutory jurisdiction, authority, or limitations."

287. DHS and USCIS lack rulemaking authority to promulgate the Rule.

288. Section 103 of the INA denies DHS authority over the "powers, functions, and duties conferred upon the . . . Attorney General." 8 U.S.C. § 1103(a)(1).

289. The INA confers upon the Attorney General, not DHS, the authority to regulate adjustment of status applications, 8 U.S.C. § 1255(a), and to make public charge inadmissibility determinations for noncitizens seeking admission or adjustment of status, 8 U.S.C. § 1182(a)(4)(A).

290. The promulgation of the Rule by DHS and USCIS is in excess of the agencies' statutory jurisdiction, authority, or limitations.

291. This violation will cause ongoing harm to Plaintiffs.

COUNT FOUR

(Violation of the Fifth Amendment – Equal Protection and Due Process)

292. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

293. The Due Process Clause of the Fifth Amendment prohibits the federal government from denying persons due process of law and the equal protection of the laws.

294. The Rule targets individuals for discriminatory treatment based on their race, ethnicity, and/or national origin, without lawful justification.

295. The Rule was motivated, in whole or in part, by a discriminatory motive and/or a desire to harm a particular group, nonwhite immigrants.

296. Nonwhite immigrants will be disproportionately harmed by the Rule.

297. By issuing the Rule, defendants violated the equal protection and due process guarantees of the Fifth Amendment.

298. This violation will cause ongoing harm to plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

a. Issue a declaratory judgment stating that the Rule is unauthorized by law and contrary to the Constitution and laws of the United States;

b. Vacate and set aside the Rule;

c. Preliminarily and permanently enjoin defendants from implementing the Rule or taking any actions to enforce or apply it;

d. Award plaintiffs attorneys' fees; and

e. Grant such additional relief as the Court considers just.

Dated: New York, New York
August 27, 2019

By: */s/ Jonathan H. Hurwitz*

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants

No. 4:19-cv-5210-RMP

DEFENDANTS' OPPOSITION TO MOTION FOR § 705 STAY PENDING JUDICIAL REVIEW OR FOR PRELIMINARY INJUNCTION

Motion Hearing: October 3, 2019 at 10:00 a.m.

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
(202) 353-0533

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I. INTRODUCTION

For over 135 years, Congress has restricted the admissibility of aliens who are likely, in the judgment of the Executive Branch, to become "public charges." Congress has never defined the term "public charge," but it has long been understood to mean a person who cannot provide himself with the basic needs of subsistence, and therefore imposes a burden on the public fisc to provide him with aid in obtaining those necessities. A major purpose of the public charge ground of inadmissibility is to set the expectation for immigrants that they be self-sufficient and refrain from entering the United States with the expectation of receiving public benefits, thereby ensuring that persons unable or unwilling to provide for themselves do not impose an ongoing burden on the American public. For the past two decades, the public charge ground of inadmissibility, which applies in various ways to both applications for admission to the United States and for adjustment of status to lawful permanent resident, has been governed by interim field guidance adopted without the benefit of notice-and-comment procedures.

On August 14, 2019, the Department of Homeland Security ("DHS") published *Inadmissibility on Public Charge Grounds* ("Rule") in the Federal Register. 84 Fed. Reg. 41292. This final rule is the culmination of an extensive, multi-year process to adopt regulations that prescribe how DHS will determine whether an alien applying for admission or adjustment of status is inadmissible under section 212(a)(4) of the Immigration and Nationality Act ("INA") because he is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4). This Rule is long overdue: in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), "to expand the public charge ground of inadmissibility" after concluding that "only a negligible number of aliens who become public charges have been deported in the last decade." H.R. Rep. 104-828, at 240-241 (1996); *see also* IIRIRA § 531 (enumerating "minimum" factors to be considered in every public charge determination). Congress therefore provided the INS with a list of factors to consider "at a minimum" in forming an "opinion" about whether an alien is "likely at any time to become a public charge." Yet for two decades, DHS has provided its officers, current and prospective immigrants, and the public with nothing more than an interim guidance document to specify how the factors are being implemented.

The Rule revises an anomalous definition of "public charge" set forth for the first time in that 1999 interim guidance to better reflect Congress's legislated policy making aliens who are likely to require public support to obtain their basic needs inadmissible. The Rule also reflects Congress's delegation of broad authority to the Executive Branch concerning the meaning of "public charge" and the establishment of procedures for forming an "opinion" about whether individual aliens are "likely at any time to become a public charge." The Rule is the product of a well-reasoned process that considered the plain text of the statute, legislative intent, statistical evidence, and the substance of hundreds of thousands of comments submitted by the public. Finally, the Rule has a limited scope: it does not apply to naturalization applications for lawful permanent residents ("LPRs"), or lead to public charge inadmissibility determinations based on the

receipt of Emergency Medicaid, disaster assistance, school lunches, or benefits received by U.S.-born children. Nor does it apply to refugees or asylum recipients.

Plaintiffs—a group of twelve States and the Attorney General of another State—nevertheless seek a nationwide preliminary injunction against the Rule. This Court should deny the motion. Plaintiffs, who are States rather than aliens actually governed by the Rule, cannot meet basic jurisdictional requirements, and their claims in any event are meritless. The Rule accords with the longstanding meaning of "public charge" and complies with the APA and other relevant statutes. In short, Plaintiffs provide no basis for turning their abstract policy disagreement with the Executive Branch into a stay of the effective date or a nationwide injunction.

II. BACKGROUND

"Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." 8 U.S.C. § 1601(1). "[T]he immigration policy of the United States [is] that aliens within the Nation's borders not depend on public resources to meet their needs." *Id*. § 1601(2)(A). Rather, aliens must "rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *Id*. Relatedly, "the availability of public benefits [is] not [to] constitute an incentive for immigration to the United States." *Id*. § 1601(2)(B).

These statutorily enumerated policies are effectuated in part through the public charge ground of inadmissibility in the INA. With certain exceptions, the INA provides that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission

or adjustment of status, is likely at any time to become a public charge is inadmissible." *Id.* § 1182(a)(4)(A).[1] An unbroken line of predecessor statutes going back to at least 1882 has contained a similar inadmissibility ground for public charges, and those statutes have, without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision. *See* Immigration Act of 1882, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 ("1882 Act"); 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 ("1891 Act"); Immigration Act of 1903, 57th Cong. ch. 1012, 32 Stat. 1213, 1214; Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 ("1917 Act"); INA of 1952, 82nd Cong. ch. 477, section 212(a)(15), 66 Stat. 163, 183. In IIRIRA, Congress added to these predecessor statutes by instructing that, in making public charge determinations, "the consular officer or the Attorney General shall at a minimum consider the alien's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills," 8 U.S.C. § 1182(a)(4)(B) (Arabic numerals substituted), but otherwise left in place the broad delegation of authority to the Executive Branch to determine who constitutes a public charge.

The longstanding denial of admission of aliens believed likely to become public charges dates from the colonial era, when a principal "concern [in] provincial and state regulation of immigration was with the coming of persons who might become a burden

[1] As of March 1, 2003, references to the Attorney General in the INA "shall be deemed to refer to the Secretary" of Homeland Security where they describe functions transferred to DHS by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). *See* 6 U.S.C. § 557 (2003); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

to the community," and "colonies and states sought to protect themselves by [the] exclusion of potential public charges." E. P. Hutchinson, Legislative History of American Immigration Policy, 1798-1965 at 410 (1981). Provisions requiring the exclusion and deportation of public charges emerged in federal law in the late 19th century. *See, e.g.*, 1882 Act at 214 (excluding any immigrant "unable to take care of himself or herself without becoming a public charge"); 1891 Act § 11, 26 Stat. at 1086 (providing for deportation of "any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing").

In 1996, Congress enacted immigration and welfare reform statutes that bear on the public charge determination. IIRIRA strengthened the enforcement of the public charge inadmissibility ground in several ways. Besides codifying mandatory factors for immigration officers to consider, *see supra*, it raised the standards and responsibilities for persons who must "sponsor" an alien by pledging to bear financial responsibility for that immigrant and requiring that sponsors demonstrate sufficient means to support the alien. Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), restricted most aliens from accessing many public support programs, including Supplemental Security Income ("SSI") and nutrition programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable against sponsors.

In light of the 1996 legislative developments, the INS attempted in 1999 to engage in formal rulemaking to guide immigration officers, aliens, and the public in understanding public charge determinations. *See Inadmissibility and Deportability on*

Public Charge Grounds, 64 Fed. Reg. 28676 (May 26, 1999) ("1999 NPRM"). No final rule was ever issued, however. Instead, the agency adopted the 1999 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) ("1999 Interim Field Guidance"). The 1999 Interim Field Guidance dramatically narrowed the public charge inadmissibility ground by defining "public charge" as a person "primarily dependent on the government for subsistence," *id.*, and by barring immigration officers from considering any non-cash public benefits, regardless of the value or length of receipt, as part of the public charge determination. *See* 64 Fed. Reg. at 28678-79. Under that standard, an alien receiving Medicaid, food stamps, and public housing, but no cash assistance, would have been treated as no more likely to become a public charge than an alien who was entirely self-sufficient.

The Rule revises this approach and adopts, through notice-and-comment rulemaking, a well-reasoned definition of public charge providing practical guidance to Executive Branch officials making public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("NPRM"). The NPRM provided a 60-day public comment period, during which 266,077 comments were collected. *See* Rule at 41297. After considering these comments, DHS published the Rule, addressing comments, making several revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision. Among the Rule's major components are provisions defining

"public charge" and "public benefit" (which are not defined in the statute), an enumeration of factors to be considered in the totality of the circumstances when making a public charge determination, and a requirement that aliens seeking an extension of stay or a change of status show that they have not received public support in excess of the Rule's threshold since obtaining nonimmigrant status. The Rule supersedes the Interim Field Guidance definition of "public charge," establishing a new definition based on a minimum time threshold for the receipt of public benefits. Under this "12/36 standard," a public charge is an alien who receives designated public benefits for more than 12 months in the aggregate within a 36-month period. *Id*. at 41297. Such "public benefits" are extended by the Rule to include many non-cash benefits: with some exceptions, an alien's participation in the Supplemental Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid, and Public Housing may now be considered as part of the public charge inadmissibility determination. *Id.* at 41501-02. The Rule also enumerates a non-exclusive list of factors for assessing whether an alien is likely at any time to become a public charge and explains how DHS officers should apply these factors as part of a totality of the circumstances determination.

III. ARGUMENT

Plaintiffs move for a stay of the effective date of the Rule under Section 705 of the APA, or, in the alternative, for a preliminary injunction. *See* Mot. for Stay or Prelim. Inj. (Mot.), at 1, 19-20. As they correctly observe, "[t]he standard is the same whether a preliminary injunction against agency action . . . or a stay of that action is being sought." Mot. at 19 (quoting *Cronin v. USDA*, 919 F.2d 439, 446 (7th Cir. 1990)). "A plaintiff

seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)); *see Munaf v. Geren*, 553 U.S. 674, 690 (2008) (likelihood of success requires far more than identifying "serious, substantial, difficult, and doubtful" questions, including as to jurisdiction). Further, a preliminary injunction or a § 705 stay is "an extraordinary and drastic remedy" that should not be granted "unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). Plaintiffs fail to meet any of these requirements.

A. Plaintiffs Are Unlikely To Succeed On the Merits.

1. Plaintiffs Lack Article III Standing And Their Claims Are Unripe.

As the party invoking federal jurisdiction, Plaintiff bears the burden of establishing standing, "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Where, as here, "the plaintiff

is not [itself] the object of the government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

The States have not met, or even tried to meet, this burden. Neither their Complaint nor their preliminary injunction motion references standing. Although Plaintiffs claim irreparable harm, their assertions regarding such harm do not establish standing because those allegations comprise potential future harms that, if they ever came to pass, would be spurred by decisions of third parties not before the Court. Such speculative allegations are insufficient, particularly at the preliminary injunction stage. *See Cacchillo v. Insmed*, 638 F.3d 401, 404 (2d Cir. 2011) ("When a preliminary injunction is sought, a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment.") (internal quotation marks omitted). Here, the Rule governs DHS personnel and certain aliens. It "neither require[s] nor forbid[s] any action on the part of" Plaintiffs, *Summers*, 555 U.S. at 493, nor does it expressly interfere with any of their programs applicable to aliens. To be sure, in discussing purported irreparable harms, Plaintiffs allege such possibilities as a theoretical economic impact that might arise should aliens choose to rely more on State services or a theoretical public health episode that could occur should noncitizens choose to forgo health services altogether, but these are insufficient to confer standing on any State. Indeed, finding standing based on the allegations presented here would enable States to bring suit against the federal government to challenge virtually any imaginable action based on similarly attenuated and speculative chains of events.

For this reason, even when courts have found State standing to challenge federal immigration policies, they have limited it to circumstances in which the States' claims arise out of their proprietary interests as employers or operators of state universities. *See, e.g.*, *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 160-62 (E.D.N.Y. 2017) (rejecting state standing under "quasi-sovereign interests" and "injur[y] [to] a State's economy" theories where state proprietary interests were unidentified). And unlike other recent cases concerning immigration policy, no private parties directly affected by the Rule are named as plaintiffs here. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (plaintiffs included individuals claiming they were "separated from certain relatives who seek to enter the country"); *Regents of Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1027 (N.D. Cal. 2018) (plaintiffs challenging DACA rescission included several "Individual DACA recipients").

Plaintiffs' purported economic harms from the possibility that certain aliens may unnecessarily choose to forgo all federal benefits (thereby resulting in greater reliance on state housing and food benefits), Mot. at 54-55, also do not establish standing. As an initial matter, this theory is inconsistent with Plaintiffs' assertion that the Rule "will cause mass disenrollment and forbearance from enrollment by immigrants from federal *and state* benefit programs." Mot. at 51 (emphasis added). Further, a "causal chain involv[ing] numerous third parties whose independent decisions collectively" create injuries is "too weak to support standing." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 414 (2013) (courts are "reluctan[t] to endorse standing theories that rest on speculation about the

decisions of independent actors"). For any Plaintiff to suffer a net-increase in health benefit expenditures, (i) a material number of aliens in the State must unnecessarily choose to forgo all federal benefits (a result not required by the Rule); (ii) these aliens must then apply for, and receive, additional state benefits; and (iii) the increased state expenses for these aliens must be greater than the costs the State would have incurred for aliens who would have resided in the State, and consumed State resources, but for the Rule.

Plaintiffs' allegation that the Rule may harm the States' economies because more aliens may rely on uncompensated emergency room care, and fewer may receive and then spend federal funds within the Plaintiff States, Mot. at 53-54, is equally speculative and attenuated. So too are Plaintiffs' purported "food insecurity"-related harms. *Id.* at 54. Relying on a declarant, Plaintiffs claim that Illinois estimates a loss of "$95 to $222 million" in economic stimulus due to SNAP disenrollment. *Id*. To generate this estimate, however, the declarant relied on a Kaiser Family Foundation report for the claim that there would be a "15% to 35%" disenrollment rate. Hou Decl. ¶¶ 21-23, 25. That report, however, makes no such prediction. To the contrary, it states that there is "uncertainty about the actual impact" of the Rule and notes only that "*if* the [Rule] leads to disenrollment rates from 15% to 35%," there may be certain modest economic impacts. Samantha Artiga et al., Henry J. Kaiser Family Found., *Potential Effects of Public Charge Changes on Health Coverage for Citizen Children*, at 2, 12 (May 18, 2018) (emphasis added). In any event, Plaintiffs do not even allege that this speculative injury would noticeably affect their total state economies.

Numerous courts have concluded that analogous indirect economic effects are insufficient to confer standing on a State. In *Wyoming v. U.S. Department of Interior*, for example, the National Park Service set a cap on the number of snowmobiles permitted in certain national parks. 674 F.3d 1220 (10th Cir. 2012). The Tenth Circuit held that Wyoming's "speculative economic data" alleging "economic detriment" through reduced tourism and tax revenues was "conclusory" and "failed to . . . show[] direct injury to their . . . proprietary interests." *Id.* at 1231 & n.5, 1233-34. Nor could Iowa challenge USDA's refusal to implement disaster relief programs, because the State's allegation that it would "face increased responsibility for the welfare and support of its" citizens was "insufficiently proximate to the actions at issue." *Iowa ex. rel. Miller v. Block*, 771 F.2d 347, 353-54 (8th Cir. 1985); *see also Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015) (no standing for state challenge to DACA).

In their discussion of purported irreparable harms, Plaintiffs also speculate that the Rule could cause some aliens to forgo all health care, possibly leading to public health crises and "prevalence of disease." Mot. at 53. But this alleged harm does not suffice as a basis for standing, because such health effects would be borne by affected individuals, not States. *See New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 124 (D.D.C. 2019) ("[T]he States' general responsibility for their citizens' health and welfare . . . cannot directly support State standing because the underlying harms would be suffered by the States' citizens."). Further, like the alleged economic impacts, this allegation is too speculative to support standing—it turns on individual choices by aliens to forgo all federal health benefits and, as a result, contract and spread diseases, or otherwise cause a

public health crisis. *See Clapper*, 568 U.S. at 410 (rejecting "highly attenuated chain" theory of standing).

As a separate category of harm, the States gesture towards an organizational standing theory, claiming that the Rule will harm their "organizational missions," Mot. at 12, 51, yet they provide no authority supporting the novel extension of this theory of standing from the private organizations to whom it has always been applied to the Plaintiffs here, sovereign *States*. Generally, "[a]n organization suing on its own behalf can establish an injury when it suffered both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). The alleged injury to its mission must be "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Such plaintiffs must show that the challenged "conduct perceptibly impaired the organization's ability to provide services," not just that its "mission has been compromised" in the abstract. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). There is a compelling reason to believe that a State may not avail itself of these principles by defining itself as an "organization"; namely, the longstanding doctrines that tightly cabin the circumstances in which a State may bring suit against the United States. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (explaining that *parens patriae* suits are unavailable and describing the circumstances in which a State may sue to protect "its territory [or] its proprietary interests"). Insofar as every State's mission includes the protection of its citizens'

interests, limitations on State standing would not be recognized in the law if a State could simply rely on "organizational" standing.

Not only have Plaintiffs failed to identify a case in which a State was recognized to have standing under their organizational-mission theory, but Plaintiffs do not even allege that the Rule frustrates the performance of any specific State activity. This case is thus distinguishable from *Valle del Sol Inc. v. Whiting*, on which Plaintiffs rely. 732 F.3d 1006 (9th Cir. 2013). There, certain organizations challenged an Arizona law criminalizing, under certain circumstances, the transportation or harboring of unauthorized aliens. *See id.* at 1012-13. The plaintiff organizations—whose volunteers helped transport and shelter aliens—submitted declarations stating that their employees were "deterred from conducting these functions." *Id.* at 1018. The challenged policy thus created staffing shortages, interfering with the plaintiffs' ability to provide their services. Plaintiffs here, by contrast, do not allege that they will be incapable of providing any particular service. They allege only a harm to their "abstract social interest" in public welfare. In addition, Plaintiffs do not allege that they were forced to divert resources, and thus fail to satisfy the second requirement for organizational standing. *See City of Lake Forest*, 624 F.3d at 1088.

"Constitutional ripeness," another prerequisite of justiciability, "is often treated under the rubric of standing because 'ripeness coincides squarely with standing's injury in fact prong.'" *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). "[R]ipeness can be characterized as standing on a timeline," *Thomas*,

220 F.3d at 1138, and ripeness precludes "premature" review where "the injury at issue is speculative, or may never occur." *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014). For the same reasons stated above regarding lack of standing, Plaintiffs' claims fail to demonstrate constitutional ripeness. *See, e.g., Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018).

Prudential ripeness also counsels against consideration of Plaintiffs' claims. This doctrine "protect[s] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Habeas Corpus Res. Ctr. v. U.S. DOJ*, 816 F.3d 1241, 1252 (9th Cir. 2016). "In resolving ripeness questions, courts examine the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Id*. Fitness is generally lacking where the reviewing court "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). "[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportion, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The "major exception" is a "substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *Id.* Plaintiffs' claims clearly do not fall into this exception because the Rule does not apply to their conduct in any way, and indeed, there is no "adjust[ment] of

"conduct" that the States could undertake immediately to prevent or change the impact of the regulation.

Also, Plaintiffs' claims are all premised on speculation about the potential future effects of the Rule and disagreement with DHS's predictions based on the available evidence. *See, e.g.*, Mot. at 39, 44-47 (speculation about impact of the public charge totality of the circumstances test); *id.* at 10-12 (speculation about choices to disenroll from public benefits). "A question is fit for decision when it can be decided without considering 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010) (quoting *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002)). Plaintiffs' claims rest entirely on speculation and contingencies, thus, "judicial appraisal of these [questions]" should await the "surer footing [of] the context of a specific application of this regulation." *Colwell v. HHS*, 558 F.3d 1112, 1127 (9th Cir. 2009).

In addition, withholding judicial consideration of Plaintiffs' claims will not cause them any significant hardship. With respect to Plaintiffs, the Rule "do[es] not create adverse consequences of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm"; in fact, it does not apply to them at all, and therefore cannot serve as the basis for a ripe claim. *Ohio Forestry Ass'n*, 523 U.S. at 733. Moreover, even if Plaintiffs had alleged a cognizable type of harm, "[t]o meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting *US West Communications v.*

MFS Intelenet, Inc., 193 F.3d 1112, 1118 (9th Cir. 1999)). Plaintiffs cannot demonstrate that any of the harms they allege are either direct or immediate as described *supra*, and a substantial part of the alleged harms are merely possible financial loss to Plaintiffs over time, as potential cumulative side effects of third party individuals' decisions to take action not required by the Rule. These do not create a ripe facial challenge.

2. Plaintiffs Are Outside the Zone of Interests Regulated by the Rule.

Even if Plaintiffs could meet their standing and ripeness burdens, Plaintiffs' claims would still fail because they are outside the zone of interests served by the limits of the "public charge" inadmissibility provision in § 1182(a)(4)(A) and related sections. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision or its limits. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). Under the APA, a plaintiff falls outside this zone when its "interests are … marginally related to or inconsistent with the purposes implicit in the statute." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). This standard applies with equal force where, as here, Plaintiffs seek to challenge the government's adherence to statutory provisions in the guise of an APA claim. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

Plaintiffs plainly fall outside the zone of interests served by the limits of the meaning of public charge in the inadmissibility statute. At issue in this litigation is whether DHS will deny admission or adjustment of status to certain aliens deemed inadmissible on public charge grounds. By using the term "public charge" rather than a broader term like "non-affluent," Congress ensured that only certain aliens could be

determined inadmissible on the public charge ground. It is aliens improperly determined inadmissible, not States, who "fall within the zone of interests protected" by any limitations implicit in § 1182(a)(4)(A) and § 1183, because they are the "reasonable—indeed, predictable—challengers" to DHS's inadmissibility decisions. *Patchak*, 567 U.S. at 227; *see* 8 U.S.C. § 1252 (providing individuals who have a final order of removal from the United States based on a public charge determination an opportunity to file a petition for review before a federal court of appeals to contest the definition of public charge as applied to them). The purported harms "ultimately to state treasuries" asserted by the States, Mot. at 52, are not even "marginally related" to those of an alien seeking to demonstrate that the "public charge" inadmissibility ground has been improperly applied to his detriment. *Cf. INS v. Legalization Assistance Proj.*, 510 U.S. 1301, 1304-05 (1993) (O'Connor, J., in chambers) (concluding that relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of organizations [that provide legal help to immigrants]," and that the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect"); *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996) (dismissing under zone-of-interests test a suit challenging parole of aliens into this country, where plaintiffs relied on incidental effects of that policy on workers).

3. Plaintiffs' Substantive Claims Lack Merit.

a. The Rule is Consistent With the Plain Meaning of "Public Charge."

The definition of "public charge" in the Rule is consistent with the plain meaning

of the statutory text, which is to "be determined with reference to its dictionary definition at the time the statute was enacted." *U.S. v. Carona*, 660 F.3d 360, 367 (9th Cir. 2011). Here, it is undisputed that, since 1882, Congress has consistently provided for the exclusion of indigent aliens determined by the Executive Branch as likely to become "public charges." *Compare* Mot. at 23, 26-27, *with* NPRM at 51125.

Contemporary dictionaries from the 1880s define "charge" as "an obligation or liability," such as "a pauper being chargeable to the parish or town." Stewart Rapalje et al., Dict. of Am. and English Law (1888) ("Rapalje 1888"); *accord* Frederic Jesup Stimson, Glossary of the Common Law (1881) (defining "charge" as "[a] burden, incumbrance, or lien; as when land is charged with a debt") ("Stimson 1881"). As to the term "public," such dictionaries explain the term "public" as meaning "[t]he whole body of citizens of a nation, or of a particular district or city, [or] [a]ffecting the entire community." Rapalje 1888; *see also* C.H. Winfield, Words and Phrases, A Collection of Adjudicated Definitions of Terms Used in the Law, with References . . ., 501 (1882) ("[P]ublic" means "not any corporation like a city, town, or county but the body of the people at large.") (quoting *Baker v. Johnston*, 21 Mich. 319, 335 (Mich. 1870)). Together, these early definitions make clear that an alien becomes a "public charge" when his inability to achieve self-sufficiency imposes an "obligation" or "liability" on "the body of the citizens" to provide for his basic necessities, as reflected in early legal sources addressing the term "public charge." *See* Arthur Cook et al., Immigration Laws of the U.S., § 285 (1929) ("Public charge means any maintenance, or financial assistance,

rendered from public funds.").[2]

Nothing about the plain meaning of this term suggests that a person must be "unable to care for himself or herself and primarily dependent on the state for support," as Plaintiffs contend. Mot. at 4. When Congress originally enacted the public charge inadmissibility ground, the term "pauper" was in common use for a person in extreme poverty. *See, e.g.*, Century Dictionary & Cyclopedia (1911) (defining "pauper" as "[a] very poor person; a person entirely destitute"); *accord* Mot. at 23 (citing, *e.g.*, The Century Dictionary of the English Language (1889-91)). Contrary to Plaintiffs' argument, however, these terms were not "interchangeable." Mot. at 23; *see Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp.*, 23 N.J.L. 169, 172 (N.J. 1851) (treating "a pauper" and "a person likely to become chargeable" as two separate classes). Congress made this clear in early versions of the statute by setting forth separate grounds of inadmissibility (or, in the parlance of immigration law at that time, "exclusion") for

[2] The original public meaning of "public charge," as derived from the definitions of "public" and "charge," is consistent with modern dictionary definitions of the term "public charge." For example, the online version "of the Merriam-Webster Dictionary defines public charge simply as 'one that is supported at public expense.'" NPRM at 51158 (quoting "Public Charge", http://www.merriam-webster.com/dictionary/public%20charge (last visited Sept. 19, 2019)). Similarly, "Black's Law Dictionary (6th ed.). . . defines public charge as 'an indigent; a person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty.'" *Id.*

paupers and for public charges. For example, in 1891, Congress provided that:

> the following classes of aliens shall be excluded from admission . . . :
>
> All idiots, insane persons, paupers *or* persons likely to become a public charge, persons suffering from a loathsome . . . disease, [those] convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another . . . unless it is affirmatively . . . shown . . . that such person does not belong to one of the forgoing excluded classes."

1891 Act at 1084 (emphasis added). Congress thereby made "clear that the term 'persons likely to become a public charge' is *not* limited to paupers or those liable to become such; 'paupers' are mentioned as in a separate class." *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (emphasis added).[3] And in response to a 1916 Supreme Court opinion reasoning that the term "public charge" must be read as "generically similar" to terms "mentioned before and after" (such as "pauper"), *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915), Congress relocated the term "public charge" in the statute.[4] *See* 1917 Act § 3 n.5,

[3] Plaintiffs note that Congress removed the separate inadmissibility ground of "pauper" in 1990. *See* Mot. at 27. This does not mean that "public charge" and "pauper" are "interchangeable," however. Mot. at 23. Rather, it is indicative of the fact that, by abolishing poorhouses and almshouses, society has revised public services in a way that negates the former distinctions among types of public support provided to individuals needing different amounts of aid.

[4] In *Gegiow*, the Court applied this "generically similar" analysis to reject a public charge determination made in reliance on the "overstocked" "state of the labor market" in plaintiffs' intended destination city of Portland, Oregon, because the determinations of

reprinted in Immigration Laws and Rules of January 1, 1930 with Amendments from January 1, 1930 to May 24, 1934 (1935) ("This clause . . . has been shifted . . . to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons" and to "overcom[e] the decision of the Supreme Court in *Gegiow*").[5] Subsequent cases recognized that this alteration negated the Court's interpretation in *Gegiow* by underscoring that the term "public charge" is "not associated with paupers or professional beggars." *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (explaining that "public charge" in the 1917 Act "is differentiated from the application in *Gegiow*"). Neither the structure of the statute nor any other factor provides any evidence that Congress intended to cabin "public charge" more narrowly than the plain meaning of the term.

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the other categories of exclusion (such as "professional beggars," "convicted felons," or "paupers," could be made "irrespective of local conditions." 239 U.S. at 9-10.

[5] The 1917 Act's lengthier list of exclusions included, *inter alia*:

> idiots, imbeciles, feeble-minded persons, epileptics, insane persons; . . . persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a . . . disease; persons . . . certified by the examining surgeon as being mentally or physically defective . . . of a nature which may affect the ability . . . to earn a living; [felons]; polygamists . . . ; anarchists, or persons . . . who advocate . . . the unlawful destruction of property; . . . prostitutes . . .; persons . . . induced, assisted, encouraged, or solicited to migrate . . . by offers . . . of employment [or] . . . advertisements for laborers . . . in a foreign country; persons likely to become a public charge; persons . . . deported [within the previous year]; stowaways," and others.

1917 Act at 875-76.

Strikingly, although Plaintiffs contend that the definition of "public charge" as one "primarily dependent on the state" has endured "[f]rom colonial . . . through modern times," Mot. at 4, they fail to identify *any* source, let alone a set of longstanding or widespread sources, that defined "public charge" using the phrases "primarily dependent" or "primary dependence" prior to 1999, when INS issued the nonbinding, interim field guidance. In contrast, there is longstanding evidence that the term "[p]ublic charge means any maintenance, or financial assistance, rendered from public funds." Cook, Immigration Laws, § 285; *see also* 26 Cong. Rec. 657 (1894) (statement of Rep. Warner) (explaining that under the public charge inadmissibility ground, "[i]t will not do for [an alien] [to] . . . earn half his living or three-quarters of it, but that he shall presumably earn all his living . . . [to] not start out with the prospect of being a public charge"). Courts have also suggested that the exclusion of public charges extended to those who, although earning a modest living, might need assistance with "the ordinary liabilities to sickness, or . . . any other additional charges . . . beyond the barest needs of existence." *U.S. v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) (holding that immigration officers properly required a bond from a poor family on account of poverty, even though the ultimate reliance on public aid occurred through commitment to an insane asylum); *see also In re Feinknopf*, 47 F. 447, 447 (E.D.N.Y. 1891) (determining that an alien was not likely to become a public charge after considering, as distinct evidence, whether the alien "received public aid or support" or had been an "inmate of an almshouse"). Such individuals impose a "liability" on "the body of the people at large," even if they are not fully destitute. This interpretation of "public charge" conforms with Congress's explicit

instruction that "the immigration policy of the United States [is] that . . . [a]liens within the Nation's borders [should] not depend on public resources to meet their needs." 8 U.S.C. § 1601(2)(A).

Plaintiffs' reliance on a variety of state law sources from the 19th century to support their cramped construction of "public charge" as "permanently incapable of caring for themselves" is misplaced. *See* Mot. at 24-25. First, many of those cases equated "paupers" with "public charges," as Congress explicitly did not do. *See Frick*, 233 F. at 396; *Horn*, 292 F. at 457. For example, *Boston v. Capen*, the lead case on which Plaintiffs rely, explained that "those who have been paupers in a foreign land; that is, for those who have been a public charge in another country" are those for whom "the word 'paupers' [is] used . . . in its legal, technical sense." 61 Mass. 116, 121 (Mass. 1851). Second, other cases and sources on which Plaintiffs rely recognized implicitly that a pauper may *also* be a public charge, *i.e.*, that persons may be both paupers and public charges (which is logical, because an extremely destitute person may also be a person who receives support from public benefit programs for his basic necessities). *See* Mot. at 25 (quoting, *e.g.*, *Pine Twp. Overseers v. Franklin Twp. Overseers*, 4 Pa. D. 715, 716 (Pa. Quar. Sess. 1894) ("both mother and child, the present pauper, were public charges for maintenance and support"); Act of Mar. 20, 1850 (Mass.) (same)).[6] Finally, other contemporaneous state

[6] Plaintiffs' effort to "incorporate . . . by reference" arguments made in their 163-page First Amended Complaint and the Complaint in another case in a distant jurisdiction must be disregarded. Mot. at 26 & n.12. Plaintiffs make explicit that they have omitted the materials they wish to "incorporate" to comply with "page limitations" for their brief. *Id.*

sources demonstrate that "public charge" had a far broader definition than the narrow interpretation Plaintiffs urge. The Maine Supreme Court, for example, identified as "likely to become chargeable" to a town to which he had travelled a person who required only "a small amount" of assistance, based on his "age and infirmity." *Inhabitants of Guilford v. Inhabitants of Abbott*, 17 Me. 335, 335-36 (Me. 1840) (reaching conclusion despite recognizing that, at "the time of filing the complaint he . . . had strength to perform some labor, [] was abundantly able to travel from town to town," and had a "house provided for him" in another town). And the Vermont Supreme Court recognized that receipt of public aid, not complete destitution, was the standard for chargeability. See *Town of Hartford v. Town of Hartland*, 19 Vt. 392, 398 (Vt. 1847) (widow and children with a house, furniture, and a likely future income of $12/year from the lease of a cow were nonetheless public charges after receiving relief in "the amount of some five dollars").

Nor do "agency interpretations"—apart from the novel and anomalous 1999 Interim Field Guidance—support the view that "public charge" means *only* "those primarily dependent on the government," as Plaintiffs aver. Mot. at 31. From the

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Plaintiffs may not "so blatantly [] evade the page limitation," *In re Cirrus Logic Sec. Litig.*, 946 F. Supp. 1446, 1471 n.16 (N.D. Cal. 1996), particularly in a brief for which the Court has already granted them a 500% increase of the standard length. *Accord Calence, LLC v. Dimensional Data Holdings, PLC*, 222 F. App'x 563, 566 (9th Cir. 2007) (affirming district court's refusal to consider materials that a party attempted to "incorporate by reference into its motion for preliminary injunction").

beginning, immigration authorities have recognized that the plain meaning of the public charge ground of inadmissibility encompasses all of those likely to become a financial burden on the public, and that the purpose of the provision is to exclude those who are not self-sufficient. For example, in 1916 (during the drafting of legislation that became the 1917 Act), the Secretary of Labor explained in a letter to the House Committee on Immigration and Naturalization that a person is "likely to become a public charge" when "such applicant may be a charge (an economic burden) upon the community to which he is going." H.R. Doc. No. 64-886, at 3-4 (1916). The Secretary also explained that the public charge clause "for so many years has been the chief measure of protection in the law . . . intended to reach economic rather than sanitary objections to the admission of certain classes of aliens." *Id.* at 3. The Secretary therefore urged Congress to address the "defect in . . . the arrangement of the wording" identified in *Gegiow*, and Congress then did so. *Id.*; *see supra*.[7] Several decades later, then-Attorney General Robert F. Kennedy explained that a "specific circumstance," which he described as any "fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public," is the standard for demonstrating a likelihood to become a public charge. *Matter of*

[7] Plaintiffs' position also finds scant support in *Public Charge Provisions of Immigration Law: A Brief Historical Background, available at* https://go.usa.gov/xVERe (last visited Sept. 19, 2019). This online description of the history of the public charge provision by USCIS explains directly that the "public charge" exclusion is rooted in "the cost of caring for" immigrants who are "poor," and that "officials applied the provision widely," albeit "inconsistently." *Id.*

Martinez-Lopez, 10 I. & N. Dec. 409, 421 (A.G. 1962) (rejecting argument that an alien's misrepresentation of an offer of employment was sufficient to render the alien deportable). The receipt of the public benefits enumerated in the Rule for 12 months within a 36-month period readily qualifies as such a fact.

Finally, it is not the case that usage of the "public charge" ground of inadmissibility has been rare historically. *See* Mot. at 1, 5 (contending that the "public charge" ground has been "rarely" used). As explained above, Congress and the Executive Branch have long recognized the "public charge" ground as a "chief measure" for ensuring the economic self-sufficiency of aliens. H.R. Doc. No. 64-886, at 3. Immigration statistics during the last century reveal both the ebbing and flowing of the use of the "public charge" ground of inadmissibility. For example, during the 1920s, the two separate categories of public charge deportation tracked by the Department of Labor amounted to the second largest category of those deported, behind those without a proper visa under the 1924 immigration statute, and ahead of those in the "criminal and immoral classes." *See* U.S. Nat'l Comm. on Law Observance and Enforcement, U.S. Wickersham Comm. Reports 124 (1931) ("Wickersham Comm.").[8] Further, to the extent public charge inadmissibility determinations have dwindled since the introduction of the novel "primarily dependent" standard in the 1999 Interim Field Guidance, *see* Mot. at 5 n.5, that undercuts Plaintiffs' argument that the 1999 Interim Field Guidance should be relied

[8] The Labor Department tracked separately those who were "public charges" "for causes existing prior to entry," and those for "likely to become a public charge, including professional beggars and vagrants." Wickersham Comm. at 124.

on to provide the plain meaning of public charge, particularly given that Congress in 1996 in IIRIRA had sought "to expand" the use of the public charge ground of inadmissibility. H.R. Rep. 104-828 at 240-41.

b. The Plain Meaning of Public Charge Does Not Require Long-Term Receipt Of Government Benefits Or That Such Benefits Be Paid In Cash.

An alien's temporary receipt of public benefits also constitutes an obligation on the public to support the basic necessities of life and is therefore encompassed by the plain meaning of public charge. Both administrative practice and the analysis in early cases confirm that the "established meaning of 'public charge'" does not conflict with the Rule's 12/36 standard, as Plaintiffs assert. *See* Mot. at 6.

First, as the NPRM in this case explained, short-term receipt has been "a relevant factor under the [previous] guidance with respect to covered benefits." NPRM at 51165 & n.304 ("In assessing the probative value of past receipt of public benefits, 'the length of time . . . is a significant factor.'") (quoting 1999 Interim Field Guidance at 28690). In fact, the 1999 Field Guidance made no suggestion that an alien needed to receive cash benefits for an extended period for the totality of the circumstances to trigger a public charge determination and set no minimum period below which the receipt of such benefits would be less meaningful. 1999 Interim Field Guidance at 28690. Nothing in the 1999 standard would ensure that an alien who received, in the previous 36 months, 12 months of a public benefit considered relevant under that guidance (such as Supplemental

Security Income) would not be treated as a public charge.[9] And nothing in the plain meaning of "public charge" precludes DHS from clarifying the standard by adopting a recognizable and meaningful threshold for receipt of public benefits in a given period. *Cf. Harris Found. v. FCC*, 776 F.3d 21, 28–29 (D.C. Cir. 2015) ("An agency does not abuse its discretion by applying a bright-line rule.").

DHS's treatment of recurring, but non-permanent, receipt of public relief is also consistent with early case law. For example, a lower court in New York in the mid-nineteenth century recognized that "the modes in which the poor become chargeable upon the public" extend to "all expenses lawfully incurred," including "temporary relief." *People ex rel. Durfee v. Comm'rs of Emigration*, 27 Barb. 562, 569-70 (N.Y. Gen. Term 1858). Similarly, in *Poor Dist. of Edenburg v. Poor Dist. of Strattanville*, a Pennsylvania appellate court recognized that even a landowner with a long track record of supporting herself as a teacher, artist, and writer, could become "chargeable to" the public by temporarily receiving "some assistance" while ill, despite having "plenty of necessaries to meet her immediate wants." 5 Pa. Super. 516, 520-24 (Pa. Super. Ct. 1897). Although the court ultimately rejected the landowner's classification as a pauper, it did so not because her later earnings or payment of taxes barred this conclusion, but because, under

[9] The likelihood of short-term receipt was also considered in past regulations defining public charge in the visa context. *See, e.g.*, 22 C.F.R. § 42.91(a)(15)(iii) (1976) ("An alien who does not establish that he will have an annual income above the income poverty guidelines . . . and who is without other adequate financial resources, shall be presumed ineligible" as a public charge).

the specific facts of the case, she was "without notice or knowledge" that receipt even of limited assistance would "place[] [her] on the poor book." *Id*. at 527-28.

Nor does anything in the plain meaning of "public charge" suggest a distinction between benefits provided in cash and benefits provided as services, as Plaintiffs suggest. *See* Mot. at 7, 30. Both types of assistance create an obligation on the part of the public and both equally relieve recipients from the conditions of poverty. For this reason, consideration of an alien's receipt of public benefits for "housing, food and medical care," as "examples of the obvious basic necessities of life," falls within the reasonable parameters of determining whether that person creates a liability on the body of the public. *Am. Sec. & Tr. Co. v. Utley*, 382 F.2d 451, 453 (D.C. Cir. 1967). Plaintiffs acknowledge that receipt of in-kind services such as health care, food, and housing—the equivalents of modern benefits covered by the Rule such as Medicaid, SNAP, and public housing—were among the types of public support that rendered a person a public charge in the past, by recognizing that such persons included those who were "occupants of almshouses." Mot. at 31. The fact that the modern mores governing public assistance have appropriately deinstitutionalized the poor by providing assistance through subsidies for private housing, private food purchases, and the like does not in any way change the fact that the receipt of such subsidies imposes an "obligation" or "burden" on the body of the public.

Although the 1999 Interim Field Guidance and the 1999 NPRM adopted a different interpretation regarding non-cash benefits, those documents provide further support for DHS's determination that inclusion of such benefits in the Rule is consistent with the

plain meaning of "public charge." Both documents describe the exclusion of "non-cash public benefits" at that time as "reasonable," confirming that although they did not conclude that the meaning of "public charge" *required* consideration of such benefits, they also did not conclude that the meaning of public charge *foreclosed* their consideration. 1999 NPRM at 28677; *see id*. at 28678 ("It has never been [the] policy that the receipt of any public service or benefit *must* be considered.") (emphasis added). Indeed, the only examples of prior exclusion of non-cash benefits from consideration that the drafters of the interim guidance could identify were: (1) broadly-available public benefits such as "public schools"; and (2) the exclusion of food stamps (i.e., "SNAP") under State Department guidance that apparently did not exclude other forms of non-cash benefits. *See, e.g*., 1999 Interim Field Guidance at 28692.

c. The Rule Properly Exercises Interpretive Authority That Congress Delegated, Implicitly and Explicitly, To The Executive Branch.

The statutory term "public charge" has "never been [explicitly] defined by Congress in the over 100 years since the public charge inadmissibility ground first appeared in the immigration laws." Rule at 41308. Congress implicitly delegates interpretive authority to the Executive Branch when it omits definitions of key statutory terms, thereby "commit[ting] their definition in the first instance to" the agency, *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), to be exercised within the reasonable limits of the plain meaning of the statutory term. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). Congress has long recognized this implicit delegation of authority to interpret the meaning of "public charge." *See, e.g*., S. Rep. No. 81-1515, at 349 (1950)

(recognizing that because "there is no definition of the term [public charge] in the statutes, its meaning has been left to the interpretation of the administrative officials and the courts"). This delegation is reinforced by Congress's explicit directive that the determination be made "in the opinion of the Attorney General" or a "consular officer." 8 U.S.C. § 1182(a)(4)(A). This expansive delegation of authority grants DHS wide latitude to interpret "public charge" within the reasonable limits set by the broad, plain meaning of the term itself.

Congress's comprehensive delegation of interpretive authority is well-established in precedent dating back to the early public charge statutes. S*ee, e.g.*, *Ex Parte Pugliese*, 209 F. 720, 720 (W.D.N.Y. 1913) (affirming the Secretary of Labor's authority "to determine [the] validity, weight, and sufficiency" of evidence going to whether an individual was "likely to become a public charge"); *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 510 (2d Cir. 1921) (deference required even if "evidence to the contrary [is] very strong"). It is also recognized in Executive Branch practice. Administrative decisions have explained that Congress's broad delegation of authority in this area was necessary because "the elements constituting likelihood of becoming a public charge are varied." *Matter of Harutunian*, 14 I. & N. Dec. 583, 588-90 (BIA 1974) (quoting S. Rep. No. 81-1515 at 349 (1950) (holding that alien's receipt of "old age assistance benefits" in California was sufficient to render the alien a "public charge")); *see also Matter of Vindman*, 16 I. & N. Dec. 131 (BIA 1977) (citing regulations in the visa context, and explaining that the "elements constituting likelihood of an alien becoming a public charge are varied . . . [and] are determined administratively"). Indeed, Plaintiffs themselves seek

to preserve a *prior* exercise of this delegated interpretive authority by requiring DHS to revert to the "primarily dependent" standard for public charge determinations that appeared for the first time in the 1999 Interim Field Guidance and simultaneous 1999 NPRM. *See* Mot. at 56 (Plaintiffs "seek to keep in place [the 1999 Interim Field Guidance] which [has] governed for the past 23 years.").

The long history of congressional delegation of definitional authority over the meaning of "public charge" refutes Plaintiffs' claim that Congress has, by choosing not to impose a definition of "public charge" when revising the statute, implicitly adopted into the statute the definitions used by the Executive Branch (such as the standards described in the 1999 Interim Field Guidance or other immigration regulations). *See* Mot. at 29-30, 34. By inaction in 1996 and 2013, the occasions Plaintiffs cite, *see id.* at 29-30, Congress left the public charge provision unchanged. Mot. at 30. This inaction left in place the long-understood delegation to the Executive Branch to exercise definitional authority over the "varied" elements of the meaning of "public charge," S. Rep. No. 81-1515, at 349, as INS proposed to do in the 1999 NPRM and has done here. In this context, at most, the "[c]ongressional inaction lacks persuasive significance" because competing "inferences may be drawn from such inaction." *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 917 (D.C. Cir. 2017). And the more plausible of the competing inferences is that Congress has intended for DHS to retain the authority delegated to it to analyze the "totality of the alien's circumstances" to make "a prediction" about the likelihood that an alien will become a public charge, *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974), including the delegated authority for DHS to adopt further

procedures to guide its officers, aliens, and the public at large in understanding the application of the public charge ground of inadmissibility.

d. The Rule's Weighted Criteria Are Not Contrary To Law.

The Rule could not be more clear that it retains the "totality of the circumstances" approach under which Executive Branch officials make individualized determinations regarding whether "in the opinion of [the officer] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In contending otherwise, *see* Mot. at 35, Plaintiffs disregard the plain text of the Rule.

Plaintiffs' assertion that the Rule improperly makes "poverty" a "paramount" factor is illogical and contradicts even their own interpretation of the plain meaning of "public charge" as a person whose poverty is sufficient to make him "primarily dependent" on public support. Mot. at 24, 36. There is no dispute in this litigation that, whether "public charge" is to be interpreted in accordance with its plain meaning as a person relying on public benefits to assist with the basic necessities, or in accordance with the "primary dependence" standard created in 1999, this is a determination related to poverty, to be made in consideration of the statutorily-enumerated and other factors. *See* 8 U.S.C. § 1182(a)(4); Part A.3.a., *supra*.

Plaintiffs' criticism of the financial factors as "dispositive," Mot. at 36, is also in error. The Rule, by its terms, "contains a list of negative and positive factors that DHS will consider as part of [the public charge] determination, and directs officers to consider these factors in the totality of the alien's circumstances." Rule at 41295. "The presence

of a single positive or negative factor, or heavily weighted negative or positive factor, *will never*, on its own, create a presumption that an applicant is inadmissible . . . or determine the outcome of the . . . inadmissibility determination. Rather, a public charge inadmissibility determination must be based on the totality of the circumstances presented." *Id*. (emphasis added); *see also id*. at 41309 ("DHS has established a systematic approach to implement Congress' totality of the circumstances standard."). In fact, DHS made changes between the NPRM and the final version of the Rule to emphasize that the "totality of the circumstances" approach is retained—for example, by "amend[ing] the definition of 'likely at any time to become a public charge'" by clarifying that this means "more likely than not at any time in the future . . . as determined based on the totality of the alien's circumstances." *Id*. at 41297.[10]

Plaintiffs also err in contending that the Rule's consideration of an alien's "medical condition" is contrary to law because it is "virtually dispositive." Mot. at 36-37. At the outset, Plaintiffs' argument directly contradicts their separate argument that it is financial

[10] It is also not contrary to law for DHS to have identified several factors that may "overlap." Mot. at 36. This is not an objection to the Rule, but rather, to the statute itself: Many of the specific factors that the statute requires DHS to consider—e.g., education, skills, and assets—will correlate highly with financial status. Further, it is highly unlikely that *any* evidence-based determination of "financial status" could be made without considering different kinds of evidence that would overlap in their tendency to demonstrate whether an individual is, or is not, likely at any time to become a public charge.

status, not medical condition, that the Rule has made "dispositive." *Id.* Further, this argument ignores the explicit discussion of the medical condition factor in the Rule, which explained that, because "the public charge inadmissibility determination is made on a case-by-case basis and in the totality of the alien's individual circumstances, an applicant could overcome this heavily weighted negative factor through presentation of other evidence," including "proof of income, employment, education and skills, private health insurance, and private resources." Rule at 41445.

Plaintiffs' other arguments regarding the "health" factor, Mot. at 37-38, are no more cogent in their analysis. The suggestion that Congress has forbidden the Rule to consider medical conditions other than those "expressly set forth as [the] basis of inadmissibility" under 8 U.S.C. § 1182(a)(1)(A), Mot. at 37, ignores the plain text of the statutory "public charge provision," § 1182(a)(4)(B)(i), which *requires* "health"—without any specific definition thereof[11]—to be considered as part of the "public charge" determination, *i.e.*, as part of an *entirely separate* ground of inadmissibility from the specific list enumerated in § 1182(a)(1)(A). And Congress's removal of certain health-related grounds of inadmissibility in a 1990 amendment cannot plausibly supersede the more-specific requirement added by Congress six years later in 1996 making consideration of the "health" factor mandatory as part of the public charge ground of

[11] As with "public charge" itself, Congress, by leaving the meaning of "health" undefined in § 1182(a)(4)(B)(i), has delegated to DHS the authority to reasonably interpret the term "health" as it relates to making an overall determination of the public charge ground of inadmissibility. *See Jong Ha Wang*, 450 U.S. at 144; *Chevron*, 467 U.S. at 844.

inadmissibility. *See* IIRIRA § 531. *See Hellon & Assocs. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

The Rule's consideration of non-cash public benefits is not inconsistent with the PRWORA's authorization of "qualified aliens" to receive certain public benefits five years after entry, contrary to Plaintiffs' brief suggestion otherwise. *See* Mot. at 39. First, there is no inconsistency because the "qualified aliens" to whom that authorization applies are generally not subject to the public charge test. *See* 8 U.S.C. § 1641(b) ("qualified alien" includes, *inter alia*, lawful permanent residents, asylum recipients, and refugees). Also, the Rule does not prohibit anyone from receiving benefits to which they are entitled, but rather appropriately takes such receipt into consideration among many other factors in assessing an individual's likelihood of becoming a public charge. *See* Rule at 41365-66. Notably, Congress implicitly recognized that past receipt of public benefits can be considered in determining the likelihood of someone becoming a public charge when it prohibited consideration of past benefits for certain "battered aliens." 8 U.S.C. § 1182(s). Congress, therefore, understood and accepted DHS's consideration of past receipt of benefits in other circumstances.[12]

[12] Neither of the cases cited by Plaintiffs on this issue support their position. In *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 147-49 (D. Mass. 2004), the court interpreted the text of the Americans with Disabilities Act so as not to preclude employees from receiving the protections provided by that statute. Here, as noted, the Rule does not preclude anyone from receiving public benefits. Nor does the Rule create a "trap for the unwary" akin to that described in *Rotenberry v. Comm'r*, 847 F.2d 229, 233 (5th Cir. 1988). The receipt

e. The Rule is Not Arbitrary and Capricious.

Many of Plaintiffs' arguments are raised as claims that the Rule is "arbitrary and capricious" under the APA, but Plaintiffs fail to meet this demanding standard. *See* 5 U.S.C. § 706(2)(A). Arbitrary and capricious review "is highly deferential; the agency's decision is entitled to a presumption of regularity, and [the court] may not substitute [its] judgment for that of the agency." *Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016) (cleaned up). Plaintiffs' arguments repeatedly suffer from the same flaw: a disregard for the explanations presented in the NPRM and Rule. But the Court may not disregard DHS's "explanations, reasoning, and predictions" simply because Plaintiffs "disagree[] with the policy conclusions that flowed therefrom." *Calif. by & through Becerra v. Azar*, 927 F.3d 1068, 1079 (9th Cir. 2019), *reh'g en banc granted*, 927 F.3d 1045 (9th Cir. 2019). And if review here is warranted at all, *see* Part III.A.1-A.2, *supra*, an especially high degree of deference is required given that admission and exclusion of aliens is historically committed to the political branches. *See Hawaii*, 138 S. Ct. at 2418.

1. DHS Adequately Responded to Comments Concerning Potential Harms.

Plaintiffs argue that DHS failed to adequately address potential harms resulting from the Rule, particularly those related to impacts on public health. An agency's obligation to respond to comments on a proposed rulemaking is "not 'particularly demanding,'" however, and DHS did respond to the substance of the comments Plaintiffs identify. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C.

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of public benefits by eligible aliens comes with no guarantees that there will not be immigration consequences based on the receipt of such benefits.

Cir. 2012). "Nothing in the APA saddles agencies with the crushing task of responding to every single example cited in every single comment." *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 458 (D.C. Cir. 2019). Rather, "the agency's response to public comments need only enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (internal quotations omitted).

First, DHS adequately addressed comments concerning vaccinations. Mot. at 42. Indeed, based in part on its consideration of such comments, DHS decided to exclude receipt of Medicaid by aliens under the age of 21 or by pregnant women from the definition of public benefits. Rule at 41384, 41471. That change alone should eliminate much of the concern that children will forgo vaccinations as a result of the Rule. *See id*. at 41384. In addition, DHS noted that "[v]accinations obtained through public benefits programs are not considered public benefits" and "local health centers and state health departments provide preventive services that include vaccines that may be offered on a sliding scale fee based on income." *Id*. at 41384-85. For these reasons, DHS concluded "that vaccines would still be available for children and adults even if they disenroll from Medicaid." *Id.* at 41385.[13]

[13] Plaintiffs take issue with DHS's reasoning that "local health centers and state health departments provide preventive services that include vaccines that may be offered on a sliding scale fee based on income" on the grounds that it supposedly lacks "analysis." Mot. at 44. But that conclusion met and, indeed, exceeded the standard governing an agency's response to comments. *See Simpson v. Young*, 854 F.2d 1429, 1435 (D.C. Cir.

Likewise, DHS sufficiently responded to comments about other potential negative health consequences resulting from disenrollment. Plaintiffs concede that DHS acknowledged these potential consequences but argue that DHS did not conduct an "adequate analysis" and did not "quantify the human and economic impact." Mot. at 43. But Plaintiffs cite no cases holding that, to comply with the APA, an agency must "quantify" all potential effects of a rule. *Id.* Nor could they. The APA does not require agencies to "obtain[] the unobtainable," *FCC v. Fox Television Statutes, Inc.*, 556 U.S. 502, 519 (2009), or "measure the immeasurable." *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013); *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017) (finding agency action was not arbitrary and capricious notwithstanding agency's "failure to quantify" effects). Notably, Plaintiffs fail to identify any methodology DHS could have used to reliably quantify the "human and economic impact" of speculative potential increases in "malnutrition, unintended pregnancies, substance abuse" and other similarly qualitative effects. Mot. at 42-43. "As predicting costs and benefits without reliable data is a 'primarily predictive' exercise, the [agency] need[s] only to acknowledge [the] factual uncertainties and identify the considerations it found persuasive in reaching its conclusions." *SIFMA v. CFTC*, 67 F. Supp. 3d 373, 432 (D.D.C. 2014). DHS did so here, explaining why data limitations and other factors made it difficult to predict disenrollment and discussing why the Rule was nevertheless justified by the strong public

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1988) ("The agency need only state the main reasons for its decision and indicate it has considered the most important objections."). In any event, Plaintiffs do not dispute the accuracy of DHS's reasoning or present any evidence to rebut it.

interests served by the Rule. *See* Rule at 41312-14. DHS's decision to move forward notwithstanding potential, unquantifiable harms is a quintessential exercise of the agency's policymaking function and is neither arbitrary nor capricious. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) ("When . . . an agency is obliged to make policy judgments where no factual certainties exist . . . we require only that the agency so state and go on to identify the considerations it found persuasive.").[14]

For similar reasons, DHS adequately addressed comments raising concerns about the Rule's effects on children. Mot. at 44-45 (Bays Decl., Exs. S at 32-35, VV at 12-13). Those comments addressed harms to children resulting from disenrollment in benefits, *see id*., but as discussed above, DHS provided a detailed response concerning the disenrollment impact and explained why the potential harms did not justify DHS inaction in providing a definition of "public charge" that accounts for the factors promulgated by Congress and Congress's direction that immigration policy promote the "basic principle" of self-sufficiency. 8 U.S.C. §§ 1182(a)(4); 1601; *see* Rule at 41312-14; *see also* Rule at 41371 (recognizing that parents may decide to disenroll their children from public benefits programs but noting the Rule's purpose to ensure aliens are self-sufficient).

[14] Moreover, DHS made a number of changes to the Rule to mitigate some of the concerns raised regarding disenrollment impacts, such as excluding certain benefits from the scope of the Rule. Rule at 41313-14, 41471. This process—full consideration of the issues and the evidence on both sides, the adoption of changes in response, and an articulated statement of the reasons for the agency's ultimate decision—was neither arbitrary nor capricious.

Plaintiffs also discuss comments questioning whether the Rule should apply to children at all because "they are too young to work and their use of public benefits is not probative of their likelihood of becoming a public charge when older." Mot. at 45. But DHS addressed the substance of those comments as well, noting that Congress explicitly required DHS to consider age in public charge determinations, *see* 8 U.S.C. § 1182(a)(4)(B)(i)(I), and that Congress has made children subject to the public charge ground of inadmissibility even while carving out other exceptions. *See* Rule at 41371.[15] Moreover, it was reasonable for DHS to conclude that a child's receipt of public benefits is relevant to assessing his or her likelihood at any time of becoming a public charge.

Plaintiffs also note that DHS exempted Medicaid benefits received by individuals under the age of 21 but not SNAP benefits or federal housing assistance. Mot. at 45. DHS, however, cited "strong legal and policy reasons to assume that Congress did not intend

[15] Notwithstanding the Plaintiffs' suggestion that DHS erred by applying a "rigid public charge analysis to children," Mot. at 45, their own argument recognizes that the meaning of "public charge" has *never* excluded children. *See, e.g.*, Mot. at 25 (discussing a "mother and child [who] were public charges" (quoting *Pine Twp. Overseers*, 4 Pa. D. at 716); Mot. at 32-34 (discussing 1999 Interim Field Guidance, which did not exclude children's receipt of public benefits even though it specifically addressed and excluded—as does the Rule—certain categories of benefits received exclusively by children, such as attending public schools or receiving school lunches, *compare* 1999 Interim Field Guidance at 28692 *with* Rule at 41389 (rejecting comments urging the inclusion of school lunches as a public benefit)).

DHS to treat receipt of Medicaid by alien children under the age of 21 in the same way as receipt of Medicaid by adult aliens." Rule at 41380. For example, Congress expressly provided that receipt of Medicaid by aliens under the age of 21 would not trigger a reimbursement requirement for the alien's sponsor under an Affidavit of Support but made no similar provision for SNAP or housing assistance. *Id*. at 41375 n.431, 41380; *see also id*. at 41374 (describing reasons for the Rule's inclusion of SNAP benefits); *id*. at 41376-78 (describing reasons for the Rule's inclusion of housing benefits). Moreover, Congress authorized states to expand Medicaid eligibility to aliens under the age of 21 without a waiting period, *id*. at 41380, whereas there is no similar authorization for housing benefits and the INA's waiver of the waiting period for SNAP applies only to "qualified aliens," 8 U.S.C. § 1613(a), (c)(2)(L), who are generally not subject to the public charge test, *see id*. § 1641(b).

DHS also adequately responded to comments concerning the Rule's effects on elderly and disabled individuals. As a threshold matter, the Rule's treatment of disabled individuals is not discriminatory, for the reasons discussed in Section III.A.3.e., nor does it mean "that anyone with a significant disability is likely to become a public charge," as Plaintiffs claim. Mot. at 46. The Rule does not deny any alien admission into the United States or adjustment of status simply because he or she is disabled. Only if an alien, disabled or not, is likely to use one or more covered federal benefits for the specified period of time will that individual be found inadmissible as a public charge. DHS will consider an alien's health as one factor among many under the totality of the circumstances. Rule at 41368. Plaintiffs also suggest it is somehow improper for the Rule

to consider receipt of Medicaid benefits by a disabled individual because Medicaid can assist that person in getting to work and therefore in attaining what Plaintiffs characterize as "self-sufficiency." Mot. at 46. But an individual who relies on Medicaid benefits for an extended period of time in order "to get up, get dressed, and go to work," *id*., is not self-sufficient. Plaintiffs' argument also ignores that Congress's goal of ensuring that aliens do not rely on public resources, *i.e.*, of ensuring self-sufficiency, is not identical to the goal of self-sufficiency for those enrolled in public benefit programs. For aliens, Congress's intent is "that aliens should be self-sufficient before they seek admission or adjustment of status," Rule at 41308, not that they be able to work through the assistance of public benefits.

As for elderly aliens, Plaintiffs argue that DHS ignored non-economic "contributions they make to family stability," and, through the Rule, "[p]revents [them] from accessing benefits they have paid for." Mot. at 46. To the extent Plaintiffs contend that the Rule should not apply to elderly individuals, or that DHS should have exempted elderly individuals altogether, that claim is foreclosed by the statutory requirement that "age" be considered in making a public charge determination, 8 U.S.C. § 1182(a)(4)(B)(i), as well as the longstanding plain meaning of the term "public charge." *See, e.g.*, *Martinez-Lopez*, 10 I. & N. Dec. at 421 (then-A.G. Kennedy recognizing that "advanced age" is a "specific circumstance . . . reasonably tending to show that the burden of supporting the alien is likely to be cast on the public"). DHS explicitly "recognize[d] the tangible and intangible value" of intergenerational family support, adequately explained the Rule's treatment of elderly individuals, and further reiterated that, in the

application of the totality-of-the-circumstances determination, "other adequate means of support, such as from family members," would be treated "as positive factors." Rule at 41403.

2. Factors Considered as Part of the Public Charge Test Are Not Arbitrary or Capricious.

Plaintiffs argue that "DHS's multifactor test is itself arbitrary and capricious" and asserting that various factors described in the Rule are "poorly defined" or not "rational." Mot. at 47. The examples Plaintiffs identify, however, are each highly relevant in assessing an individual's likelihood of becoming at any time a public charge. DHS therefore reasonably incorporated them into the public charge analysis in the Rule.

First, the Rule logically considers an applicant's income in the totality of the circumstances. Under the Rule, "[a]ny household income between 125 percent and 250 percent of the [Federal Poverty Guidelines ("FPG")] is considered a positive factor in the totality of the circumstances." Rule at 41448. Income above 250 percent of FPG is considered a heavily weighted positive factor. *Id*. at 41446. If household income is less than 125 percent of the FPG, it will generally be a heavily weighted negative factor, *id*. at 41323, although DHS will consider whether the alien has sufficient assets and resources to offset the lower income, *id*. at 41413. Plaintiffs argue that the income thresholds are "arbitrary" and "irrational." Mot. at 48. To the extent that Plaintiffs are arguing that the Rule should not consider income at all, that argument is undermined by the statutory mandate that DHS consider, *inter alia*, an alien's "assets, resources, and financial status," 8 U.S.C. § 1182(a)(4), and also by common sense because income is

obviously relevant to whether someone is likely to become a public charge. *See* Rule at 41417.

To the extent that Plaintiffs are arguing that the income threshold should be set at a higher level, DHS has adequately explained why it chose 125 percent of FPG. That level is based on the income threshold set by Congress for sponsors of aliens. *Id*. at 41447-48. Specifically, the INA requires a sponsor of an alien to agree "to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line[.]" 8 U.S.C. § 1183a(a)(1)(A). The Rule's use of the 125 percent threshold therefore maintains consistency with the threshold in the sponsor context. Rule at 41448. In addition, the 125 percent threshold is supported by data establishing a correlation between low incomes and the receipt of public benefits. Rule at 41416-17; NPRM at 51204-06. Plaintiffs' response – that the data reflects the fact that eligibility for public benefits is generally means-tested based on income – only proves Defendants' point that individuals with lower incomes are more likely to qualify for and use public benefits. Mot. at 48. Plaintiffs also note that low-income aliens use certain benefits at a rate of less than 50%, *id*., but that does not make the Rule's consideration of income, as part of the totality of circumstances, unreasonable. Last, Plaintiffs' contention that a low-income applicant who has never used public benefits "would be" "branded a public charge," Mot. at 48, ignores the fact that income is merely one of many factors considered in the totality of the circumstances and is not dispositive on its own. *See* Rule at 41413.

It was also entirely reasonable for DHS to include English proficiency as a factor to be considered as part of the totality of the circumstances, particularly given the

statutory requirement to consider an applicant's "education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). The correlation between a lack of English language skills and public benefit usage, lower incomes, and lower rates of employment, is amply supported in the record. For instance, DHS discussed U.S. Census Bureau data showing a direct relationship between an individual's English fluency and his income, as well as data demonstrating that those who spoke a language other than English at home were less likely to be employed. Rule at 41448. Data considered by DHS also show that "among the noncitizen adults who speak a language other than English at home, the participation rates for both cash and non-cash benefits are higher among those who do not speak English well, or at all, than among those who speak the language well." *Id*. at 41432; *see also* NPRM at 51195-96. Thus, Plaintiffs' claim that "DHS cites no evidence" to support its position is simply wrong. Mot. at 49. Plaintiff also argues that by relying on the data discussed above, "DHS starts from its conclusion and works backward," Mot. at 49, but this restatement of Plaintiffs' policy disagreement with DHS does not undermine DHS's reasoned consideration of the data or DHS's judgment and conclusions.[16]

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[16] Plaintiffs claim that DHS's data "undermines its conclusion" because the data "shows immigrants with limited English proficiency were more likely *not* to utilize public benefits." Mot. at 50. Plaintiffs appear to be referring to the fact that 31.3% -- *i.e.*, less than 50% -- of aliens in the survey who did not speak any English received public benefits. NPRM at 51195, at table 24. Of course, the fact that any one factor does not *by itself* show that a person is likely to become a public charge does not mean that factor is irrelevant. Because a lack of English language skills is correlated with, *inter alia*, receipt

Plaintiffs also contend that "language proficiency is not an immutable characteristic" and that the ability to speak another language may serve an applicant well economically "in the long run." Mot. at 49-50. But "DHS understands that aliens may improve their English skills in the future" and therefore it will consider evidence that a person is taking steps to improve these skills, such as by enrolling in English language courses. Rule at 41432. Moreover, Plaintiffs' argument incorrectly assumes that a person cannot be inadmissible on public charge grounds if he or she will be self-sufficient "in the long run." The pertinent statute, however, requires DHS to consider whether an alien "is likely *at any time* to become a public charge," 8 U.S.C. § 1182(a)(4)(A), not whether he has a possibility of someday attaining self-sufficiency after a period in which he is a public charge.

Plaintiffs also nod in the direction of a claim that the language proficiency requirement is vague. *See* Mot. at 49-50 (citing *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service* ("*ACGA*"), 273 F.3d 1229 (9th Cir. 2001)). In *ACGA*, an agency action was held to be arbitrary and capricious in part because of the "vagueness of the condition itself[.]" *Id*. at 1251. But, here, the Rule's consideration of "[w]hether the alien is proficient in English or proficient in other languages in addition to English" is not at all vague. Rather, by specifying this and other factors to be considered in the public charge analysis, explaining which factors are to be afforded greater weight, and describing the

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of public benefits, it is appropriate to consider it among other evidence as part of the totality of the circumstances.

types of evidence that may be considered, DHS has specifically explained how it will implement the public charge ground of inadmissibility.

Last, DHS also appropriately included credit histories and credit scores as evidence that may be considered as part of the totality of the circumstances. Plaintiffs argue that "reliance on such evidence is not justified," Mot. at 50, but the INA expressly requires consideration of an alien's "financial status." 8 U.S.C. § 1182(a)(4)(B)(i). DHS reasonably concluded that an individual's credit history and credit score are relevant evidence of his or her financial status, Rule at 41425-27, and Plaintiffs cannot show that that conclusion was unreasonable. As the Rule explains, "[c]redit reports and credit scores provide information about a person's bill paying history, loans, age of current accounts, current debts, as well as work, residences, lawsuits, arrests, collections, actions, outstanding debts and bankruptcies in the United States." *Id*. at 41425-26. "DHS's use of the credit report or scores focuses on the assessment of these debts, liabilities, and related indicators, as one indicator of an alien's strong or weak financial status[.]" *Id*. at 41426.

Contrary to Plaintiffs' suggestion, Mot. at 50, DHS also reasonably accounted for the possibility that some aliens will have a thin or nonexistent credit history. Far from penalizing aliens who lack a credit report or score, the Rule explains that "DHS understands that not everyone has a credit history in the United States and would not consider the lack of a credit report or score as a negative factor." Rule at 41426. Nor is it the case that consideration of a credit report or credit score is improper because, as Plaintiffs contend, credit reports might contain errors and a bad credit score may be the result of a temporary circumstance. Mot. at 50. Neither of these possibilities changes the

fact that, notwithstanding occasional flaws, credit reports are probative of an individual's financial condition, as evidenced by their widespread use throughout the American economy. Rule at 41426 ("A credit report generally is considered [a] reasonably reliable third-party record . . . for purposes of verifying" financial information).

f. The Rule Does Not Violate the Rehabilitation Act.

Plaintiffs argue that the Rule identifies "disability diagnosis" as a factor relevant to a public charge inadmissibility inquiry, and claim, incorrectly, that "disability will" thus "often be the 'but for' cause of a public charge determination" in violation of Section 504 of the Rehabilitation Act. Mot. at 39-40. That section provides that "[n]o otherwise qualified individual with a disability . . . shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under . . . any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794(a) (emphasis added); *see also* 6 C.F.R. § 15.30 (DHS implementing regulation). "The causal standard" for such a claim—that a plaintiff "show that [a disabled person] was denied services 'solely by reason of' her disability"—is a "strict[]" one, *Martin v. California Dep't of Veterans Affairs*, 560 F.3d 1042, 1049 (9th Cir. 2009), and Plaintiffs cannot satisfy it.

As a threshold matter, the INA explicitly lists "health" as a factor that an officer "shall . . . consider" in making a public charge determination. 8 U.S.C. § 1182(a)(4)(B)(i). "Health" certainly includes an alien's disability, and it is therefore Congress, not the Rule, that requires DHS to take this factor into account. *See, e.g.*, *In Re: Application for Temporary Resident Status*, USCIS AAO, 2009 WL 4983092, at *5 (Sept. 14, 2009)

(considered application for disability benefits in public charge inquiry). A specific, later statutory command, such as that contained in the INA, supersedes section 504's general proscription to the extent the two are in conflict (which they are not, as explained below). *See, e.g.*, *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1353 (10th Cir. 1987) ("[A] general . . . statute, § 504" may not "revoke or repeal . . . a much more specific statute . . . absent express language by Congress[.]" (internal quotation marks omitted)); *Hellon*, 958 F.2d at 297 ("in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one").

In any event, the Rule is fully consistent with section 504 of the Rehabilitation Act. The Rule does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. All covered aliens, disabled or not, are subject to the same inquiry: whether they are likely to use one or more covered federal benefits for the specified period of time. Although disability is one factor (among many) that may be considered, it is not dispositive, and is relevant only to the extent that an alien's particular disability tends to show that he is "more likely than not to become a public charge" at any time, Rule at 41368. Further, any weight assigned to this factor may be counterbalanced by other factors, including "[an] affidavit of support," "employ[ment]," "income, assets, and resources," and "private health insurance." *Id.* It is well established that such a general standard does not violate the Rehabilitation Act simply because certain persons may not meet it, in part, because of a disability. *See Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996) (citing, with approval, a Sixth Circuit case concluding

that a generally applicable standard "making 19-year-olds ineligible to compete in high school sports did not violate" the "Rehabilitation Act," even though it affected "learning disabled 19-year-olds who had been kept back in school"). Furthermore, to fall within the coverage of the Rehabilitation Act, an individual must be "otherwise qualified," 29 U.S.C. § 794(a), which means that the individual "must be able to meet all of a program's requirements in spite of his handicap." *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 173 (2d Cir. 2001). An alien who is likely to become a public charge because of his or her medical condition is not otherwise qualified for admission or adjustment of status. *See Cushing v. Moore*, 970 F.2d 1103, 1109 (2d Cir. 1992) (explaining that "an institution is not required to disregard . . . disabilities . . . , provided the handicap is relevant to reasonable qualifications").

B. Plaintiffs Fail to Establish Irreparable Harm.

"[P]laintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction." *All. For The Wild Rockies* ["AFWR"] *v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).[17] To establish a

[17] Plaintiffs suggest that the Ninth Circuit's "sliding-scale" approach to the preliminary injunction factors permits them to overcome a weak showing on any factor with a strong showing on another, Mot. 20, but this is incorrect. Circuit precedent permits a reduced showing of likelihood of success on the merits only, and only when the balance of hardships tips sharply in Plaintiffs' favor. *See AFWR*, 632 F.3d at 1135. Plaintiffs must make full showings of a likelihood of irreparable injury and that the injunction is in the public interest in order to prevail. *Id.; see also Daniels Sharpsmart, Inc. v. Smith*, 889

likelihood of irreparable harm, plaintiffs "must do more than merely allege imminent harm sufficient to establish standing; [they] must *demonstrate* immediate threatened injury." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted). Plaintiffs have failed to carry this burden because their alleged injuries are speculative and they have provided no evidence that such harms will occur immediately. Indeed, as explained above, Plaintiffs have not even established standing. *See supra* Part III.A.1.

Plaintiffs allege that the Rule will irreparably harm the "missions of state benefit programs," the "health and well-being of state residents," and the "financ[es]" of the States, Mot. at 12, but none of these allegations suffices to establish standing, let alone irreparable harm. First, as explained previously, Plaintiffs offer no basis for their assertion that a State may demonstrate irreparable harm (or standing) by asserting that a state-administered program might be frustrated in its mission. Unlike the organizations to which the States implicitly compare themselves, a State has neither a sole nor primary purpose of providing particular benefits to a certain subset of its population—particularly when the subset at issue is aliens whose presence in the United States is governed by federal immigration law. Not surprisingly, Plaintiffs have identified no case applying this novel theory of standing or irreparable injury to a State. And in any case, Plaintiffs also have not explained why any such harms would be irreparable.

F.3d 608, 615 (9th Cir. 2018). The sliding-scale approach is also erroneous, and the government preserves that issue for further review. *See Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

Second, as discussed in Part III.A.1, Plaintiffs' alleged public health and financial harms are speculative, founded on an attenuated chain of inferences, and contingent on the aggregate decisions of independent third parties to take action not required by the Rule. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Servs. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Assuming Plaintiffs are correct that some individuals will forgo enrollment or disenroll from federal benefits as a result of the Rule, Plaintiffs must still demonstrate a likelihood that such disenrollment will occur at a sufficiently high rate and magnitude, and in some cases be associated with a concomitant take-up of state benefits, to cause harm to state-level, as opposed to individual, interests.[18] Given the size of the States' programs, the number of individuals involved, and the many other reasons that individuals (aliens or citizens) might choose to forgo or disenroll from federal benefits, Plaintiffs' assertions of significant harmful effects are unsupported.

Beyond failing to demonstrate the accuracy of this underlying premise, Plaintiffs have primarily alleged anticipated effects of the Rule on individual state residents and suggested the possibility that the Plaintiff States will be harmed through the harm to those individuals, or as a result of those individuals' decisions in response to the Rule. *See* Mot. at 53-54. The harm directly to individuals does not support standing for States under Article III, let alone irreparable harm. *See Sherman*, 646 F.3d at 1178 (explaining that

[18] Plaintiffs allege that loss of public health benefits alone constitutes irreparable injury, Mot. at 52, but the cases they rely on concern only the effects of the loss of benefits on individual people, not speculative, downstream, cumulative effects on states.

states cannot bring suit on behalf of their residents' interests because they "do[] not have standing as *parens patriae* to bring an action against the Federal Government" (citation omitted)). The attenuated and speculative chain of harms claimed from individual decisions is also insufficient for both standing and irreparable harm, particularly because the States have provided no evidence of the number of disenrollments necessary to produce the public health and economic effects they allege, let alone evidence that such disenrollments are likely to occur absent immediate emergency relief. This falls far short of the showing necessary to obtain a preliminary injunction. *See Park Vill. Apt. Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) ("An injunction will not issue if the person or entity seeking injunctive relief shows a mere 'possibility of some remote future injury'" (quoting *Winter*, 555 U.S. at 22)). Indeed, Plaintiffs' own declarations in support of their motion belie their assertion that they have alleged sufficient harms, as these filings explicitly use the language of possibility rather than probability. *See, e.g.*, Linke Decl. ¶¶ 22-23 ("[T]he economic impacts of an increase in the uninsured rate could be severe"; "[T]his policy may result in a sharp decline of immigrants accessing critical services…"); MacEwan Decl. ¶ 10; Groff Decl. ¶¶ 16-17.

Plaintiffs have also failed to demonstrate that the alleged harms will be "sufficiently immediate to warrant" preliminary relief because they will occur before "a decision on the merits can be rendered." *Boardman*, 822 F.3d at 1023. Plaintiffs have alleged no facts in support of their conclusory statements that the economic or public health harms they claim would likely develop so quickly. Any such harms, if they ever emerged, would be the cumulative effect of independent decisions of thousands of third-

party aliens over the course of years. Plaintiffs offer no prediction about when these harms might arise and why the Rule's effective date must be enjoined when record-review briefing could occur in a matter of months. Indeed, Plaintiffs' own motion and declarations acknowledge the logical conclusion that the speculative and attenuated alleged impacts of the Rule, such as more expensive emergency care and reductions in productivity due to hunger, would necessarily develop over time. *See, e.g.*, Mot. at 14 ("[T]reatment will be significantly more expensive than is people received care before emergencies materialized"); *id.* at 15-16 ("Plaintiff States will also bear the public health costs as more individuals suffer from malnutrition and hunger, and ultimately, a less productive workforce"); Johnston Decl. ¶ 14 ("Without affordable, stable housing non-citizens' health will pay the cost and eventually, so will communities…"); Fehrenbach Decl. ¶¶ 35-37; Bayatola Decl. ¶ 14. The absence of evidence of *imminent* alleged harms to public health or state economies is still another factor showing the States are not entitled to preliminary relief.

C. The Remaining Equitable Factors Require Denial of Plaintiffs' Motion.

Even if Plaintiffs had made a sufficient showing on either likelihood of success on the merits or likelihood of irreparable injury, and they have not, they would still be obligated to make a satisfactory showing both that the balance of equities tips in their favor and that the public interest favors injunction. *AFWR*, 632 F.3d at 1135. These two factors merge when the government is a party, *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014), but Plaintiffs have not made a sufficient showing to meet the

standard for either factor—particularly applying the sliding-scale formulation of the test, under which they must show that the balance of equities tips *sharply* in their favor. *AFWR*, 632 F.3d at 1132. "In assessing whether the plaintiffs have met this burden, the district court has a 'duty . . . to balance the interests of all parties and weigh the damage to each.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting *L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1203 (9th Cir. 1980)). Plaintiffs assert that the equities "weigh heavily in favor" of preliminary relief because it is "in the public interest to prevent lawfully-present individuals and families with children from abandoning myriad federal and state . . . benefits to which they are entitled by law because of fear of future repercussions to their immigration status," and a stay or injunction will not harm defendants because it allegedly preserves the status quo. Mot. at 56.[19]

This analysis is facially incorrect and self-serving. As explained in detail *supra*, the harms Plaintiffs allege will flow from individuals' decisions not to use benefits are wholly speculative, and there is no support for Plaintiffs' assertions that these harms will be immediate. Conversely, there can be no doubt that the Defendants have a substantial interest in administering the national immigration system, a *solely federal* prerogative,

[19] Plaintiffs also allege that the balance of equities favors them because "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." Mot. at 56. However, the interests of the Defendants, as federal regulators, are also served by proper compliance with the law, which was undertaken in this case. *See supra*. Thus this factor is at best neutral in the balance.

according to the expert guidance of the responsible agencies as contained in their regulations, and that the Defendants will be harmed by an impediment to doing so. Quite obviously, Defendants have made the assessment in their expertise that the "status quo" referred to by Plaintiffs is insufficient or inappropriate to serve the purposes of proper immigration enforcement. Therefore, imposing the extraordinary remedy of a preliminary injunction and requiring the prior practice to continue before a determination on the merits would significantly harm Defendants.

Plaintiffs' speculative harms have no weight in the balance of hardships compared to the Defendants' interest in avoiding roadblocks to administering the national immigration system. *See Baldrige*, 844 F.2d at 674. Consequently, Plaintiffs have failed to demonstrate that the balance of hardships tips in their favor or that the public interest favors injunction. On this ground alone, their motion for a preliminary injunction must fail. *See Winter*, 555 U.S. at 26.

D. The Court Should Not Grant a Nationwide Injunction or Stay of the Effective Date.

Were the Court to order a preliminary injunction or a stay of the effective date of the Rule, it should be limited to redressing only any established injuries to Plaintiff States. Under Article III, a plaintiff must "demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). Plaintiffs have requested either a stay of the effective date of the regulation or a

preliminary injunction, but have neither requested nor alleged any facts in support of a nationwide injunction or a stay with that effect. Equitable principles require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Accordingly, the Ninth Circuit has repeatedly vacated or stayed the nationwide scope of injunctions, including in a challenge to a federal immigration rule. *See, e.g.*, *East Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2019 WL 3850928, at *2 (9th Cir. Aug. 16, 2019) ("Under our case law . . . all injunctions—even ones involving national policies—must be 'narrowly tailored to remedy the specific harm shown.'"); *see also California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (collecting cases).

Relief under 5 U.S.C. § 705 is similarly limited, as that provision permits a court to stay the effective date of an agency action only "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. Although Plaintiffs have requested a stay of the effective date of the Rule without limitation, narrower relief is both available under Section 705 and required by equitable principles applicable to extraordinary forms of relief. *See Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (indicating that courts should consider any "brief[ing] [regarding] how [to] craft a limited stay"); 5 U.S.C. § 705 (Courts "may issue all necessary and appropriate process to postpone the effective date of an agency action *or* to preserve status or rights pending conclusion of the review process." (emphasis added)). Plaintiffs acknowledge that relief under Section 705 is governed by equitable principles under the "same" standards as govern preliminary injunctions, Mot. at 18-19, and nothing in Section 705 speaks clearly enough to work "a

major departure from the long tradition of equity practice." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

Plaintiffs have not alleged, nor can their cited evidence establish, that nationwide relief is necessary to remedy their alleged harms. Any stay or injunction should be limited, at most, to the Plaintiff States and should be further limited to any relief necessary to remedy those specific harms found to be non-speculative, irreparable, and tied to the effects of the Rule. *See Azar*, 911 F.3d at 584 (rejecting argument that "complete relief" for "plaintiff states" requires enjoining "all . . . applications nationwide" of challenged regulations). It is the settled law of this Circuit that "all injunctions – even ones involving national policies – must be 'narrowly tailored to remedy the specific harm shown.'" *East Bay*, 2019 WL 3850928, at *2 (quoting *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018). Here, Plaintiffs have neither shown nor attempted to show any harm beyond their geographical borders, and any relief must therefore be limited, at most, to the Plaintiff States.

IV. CONCLUSION

For the reasons stated herein, the Court should deny preliminary relief.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	NO. 4:19-cv-05210-RMP REPLY IN SUPPORT OF PLAINTIFF STATES' MOTION FOR § 705 STAY PENDING JUDICIAL REVIEW OR FOR PRELIMINARY INJUNCTION NOTED FOR: October 3, 2019 With Oral Argument at 10:00 a.m. USDC Spokane: Courtroom 901

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I. INTRODUCTION

Unable to enact their agenda through the legislative process, Defendants (DHS) now seek to overhaul our nation's immigration system by dramatically redefining the term "public charge" through an unlawful Rule. DHS disputes neither that the Rule will harm the Plaintiff States financially and injure the health of their residents, nor that the States themselves operate and help fund the federal benefits programs included in the expanded definition of public charge. Instead, DHS trots out the argument this administration has made repeatedly without success—that an injury is too "attenuated" if the administration's rules target State residents, not the States themselves. But that argument has already been rejected, including just this year by the Supreme Court in the census case.

In attempting to defend the merits of its novel statutory interpretation, DHS similarly offers as the plain and unambiguous meaning of "public charge" a definition that Congress has twice explicitly rejected. DHS claims that the sources considered under *Chevron* demonstrate that Congress intended for *any* government support to qualify an immigrant as a public charge. It does so only by picking out ambiguous sentences from authorities whose overall meaning is demonstrably to the contrary and which support Plaintiff States' interpretation—that a public charge is someone primarily dependent on the government for subsistence. Not only is DHS's new Rule contrary to law, but in the face of thoroughly documented harms to public health and vulnerable populations, the

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Rule is arbitrary and capricious based on the agency's failure to provide a reasonable explanation for abandoning the longstanding usage of "public charge" and the statutory interpretation it has applied for decades.

DHS's unlawful refashioning of immigration policy through regulation should not take effect while the Plaintiff States' legal challenge is pending.

A. The Plaintiff States Have Standing

1. The Rule's harm to third parties does not prevent state standing

DHS asserts the Plaintiff States "have not met, or even tried to meet" the burden to establish standing. ECF No. 155 at 9 (Defs.' Opp'n to Mot. for § 705 Stay Pending Judicial Review or for Prelim. Inj.). Not so.[1] The Plaintiff States made a "clear showing of each element of standing" *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), and demonstrated the Rule will invade concrete and particularized legally protected interests, causing harm that is actual or imminent, *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1548 (2016), and which is "fairly traceable to the challenged action of the defendant" and "likely will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (ellipses, brackets, and internal quotations omitted).

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[1] *See* ECF No. 31 (Am. Compl.) ¶¶ 36, 171–395; ECF No. 34 at 10–17 (Pls.' Mot. for § 705 Stay Pending Review or for Prelim. Inj.) (citing 51 declarations demonstrating injury).

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Specifically, Plaintiff States have shown the Rule will lead to a cascade of costs to states as immigrants disenroll from federal and state benefits programs, *see* ECF No. 34 at 10–17, 51–55, thereby frustrating the States' missions in creating such programs and harming state residents. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601–02 (1982) ("As a proprietor, [a state] is likely to have the same interests as other similarly situated proprietors . . . , [a]nd like other such proprietors it may at times need to pursue those interests in court."); *id.* at 607 ("[A] state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]f the health and comfort of the inhabitants of a state are threatened, the state is a proper party to represent and defend them"); *California v. Azar*, 911 F.3d 558, 573 (9th Cir. 2018) (states established standing by showing "that the threat to their economic interest is reasonably probable").

Importantly, DHS does not dispute that the Rule will cause disenrollment, *see* 84 Fed. Reg. 41,292, 41,463 (Aug. 14, 2019), but rather argues that the "potential future harms" that follow therefrom are "spurred by decisions of third parties not before the court." *See* ECF No. 155 at 9. The Supreme Court recently rejected this argument in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In that case, the government raised the same standing arguments, namely that the alleged harms were not traceable to the Department's actions but to the

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independent actions of third parties. *Id.* at 2565–66. The Supreme Court rejected the contention, holding the plaintiffs had "met their burden of showing that third parties will likely react in *predictable* ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential." *Id.* at 2566 (emphasis added). As a result, the plaintiffs' theory of standing "d[id] not rest on mere speculation about the decisions of third parties" but "instead on the predictable effect of Government action on the decisions of third parties." *Id.*; *see also Mayor & City Council of Baltimore v. Trump*, No. ELH-18-3636, 2019 WL 4598011, at *17–18 (D. Md. Sept. 20, 2019) (applying the *Department of Commerce* decision to plaintiff's claims that the Trump administration had violated the APA in amending the Foreign Affairs Manual's section on public charge determinations, and concluding the plaintiffs had established standing).

Where, as here, the Plaintiff States have alleged and corroborated with supporting declarations that immigrants will react in a *predictable* way to the Rule, a way that DHS *concedes* they will react, and which causes significant financial harm to the Plaintiff States and the health of their residents, standing is established.[2] *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (concluding

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[2] The Plaintiff States' contentions supporting the negative health and financial outcomes resulting from the Rule are corroborated by amici curiae in this case. *See, e.g.*, ECF No. 152 at 17 (Br. of Amici Curiae Am. Academy of

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that states receive "special solicitude in our standing analysis"); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) (preliminary injunction may be granted "irrespective of the magnitude of the injury").

2. The Rule is ripe for review because it causes immediate injury to the Plaintiff States

The Plaintiff States have likewise established their claims are ripe for decision by this Court. The question of ripeness is a corollary of standing, and a party that has proven an "actual or imminent" injury in fact has established its claims are ripe. *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018).

The issues before this Court also are prudentially ripe under *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1083 (9th Cir. 2015). First, delayed review would cause hardship to Plaintiff States because "[p]ostponing review will only exacerbate [the alleged] harms." *Mayor & City Council of Baltimore*, 2019 WL 4598011, at *21. Second, the Rule is the agency's final action, so judicial intervention does not inappropriately interfere with further administrative action. Third, DHS does not identify any factual development necessary for the Court to review the legal issues. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990) ("[A] substantive rule which as a

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Pediatrics) ("Disincentivizing the use of SNAP or other public food security benefits by immigrant families will result in enduring damage to the collective health and proper development of all children in such families.").

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practical matter requires the plaintiff to adjust his conduct immediately . . . is 'ripe' for review at once . . . .").

3. The Plaintiff States are within the zone of interest of the INA

The Plaintiff States have established they have "prudential standing" under the APA, because their interests are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (citing 5 U.S.C. § 702). Because this test is "not meant to be especially demanding," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987), agency action is "presumptively reviewable" and "the benefit of any doubt goes to the plaintiff," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). A party has prudential standing unless its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

The purpose of the public charge exclusion is to prevent immigrants from becoming primarily dependent on state governments for subsistence—and thus to protect state fiscs.[3] By imposing significant uncompensated costs on the

[3] Congress enacted the original 1882 public charge exclusion in response to the U.S. Supreme Court's invalidation of materially identical public charge exclusions in state laws—at the behest of state governments. *See* Immigration Act of 1882, ch. 376, 22 Stat. 214; Hidetaka Hirota, *Expelling the Poor* 185

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Plaintiff States and undermining their comprehensive public assistance programs, the Rule undermines the very interests advanced by the statutes on which DHS relies. The States are thus well within the zone of interests. *See Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (recognizing states' economic interests in immigration policy).

B. The Rule Is Contrary to Law

The Rule fails under *Chevron*, as DHS's unprecedented interpretation of "public charge" is inconsistent with the term's plain meaning and unlawful. *See Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1. Congress has rejected the Rule's expansive definition of "public charge"

To accomplish its fundamental overhaul of the public charge doctrine, DHS necessarily disregards Congress's express and repeated rejection of the

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(2017) ("Immediately after the *Henderson* decision, immigration officials in Atlantic seaboard states campaigned to secure national immigration legislation as a substitute for state passenger laws."). The 1882 statute also relied on state officials to enforce its provisions, such as inspecting the condition of arriving passengers, excluding "any convict, lunatic, idiot, or . . . public charge," and collecting the head tax used to "provide for the support and relief of such immigrants" who "may fall into distress or need public aid." 22 Stat. 214, ch. 376 § 2.

same legislative framework DHS now seeks to implement. ECF No. 155 at 33 (dismissing repeated Congressional refusals to adopt a similar legal framework as inconclusive and "lack[ing] persuasive significance"). But Congress's rejection of DHS's current interpretation is not, as DHS asserts, subject to "several equally tenable inferences," especially where the last Congress to reenact the public charge provision rejected the very interpretation DHS now claims is plain and unambiguous. *Id.*; *see also Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 917 (D.C. Cir. 2017).

In 1996, Congress rejected proposals that would have expanded the public charge doctrine to encompass immigrants receiving non-cash benefits such as Medicaid or SNAP in the context of the Illegal Immigration Reform and Immigrant Responsibility Act, *see* ECF No. 34 at 29–30. At the time, members made explicit their reasons for rejecting such proposals. *See* S. Rep. No. 104-249, at 64 (1996) (Senator Leahy explaining the proposed framework went "too far in including a vast array of programs none of us think of as welfare"); *see also* ECF No. 34 at 39 (noting the same Congress also enacted the Welfare Reform Act expressly *authorizing* qualified immigrants to access the very benefits it had declined to include in an expanded public charge analysis). In 2013, Congress again refused to enact similar restrictions in amendments to the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). *See* ECF No. 34 at 30.

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DHS may not simply dismiss Congress's deliberate legislative judgments and then unilaterally enact the same rejected policies through rulemaking. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 533 (2009) (an agency may not do through administrative action "what Congress declined to do"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress" expressed a preference for the prevailing agency interpretation); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987).

The one case DHS cites is inapplicable. *See* ECF No. 155 at 33. In *Competitive Enterprise Institute*, the statutory term at issue was sufficiently ambiguous to leave open "the inference that the existing legislation already incorporated the offered change." 863 F.3d at 917. In contrast, here there is no ambiguity that Congress rejected the very policy DHS now proposes to make law.

DHS also fails to address the fact that when Congress repeatedly rejected these proposals, it did so against a backdrop of the agency's long-term interpretation at the time—namely, that supplemental, non-cash benefits were not considered in the public charge analysis. *Cardoza-Fonseca*, 480 U.S. at 442–43 ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language

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that it has earlier discarded in favor of other language."). In 2013, when Congress for a second time refused to adopt a framework similar to the Rule, it acted with knowledge of the prevailing 1999 Field Guidance, which expressly directed that temporary, non-cash benefits such as SNAP were supplemental in nature and would not render an immigrant likely to become a public charge. *Id.* at 442; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Equally unavailing is DHS's argument that Congress intended to delegate to the agency broad authority to interpret the term, whether implicitly or explicitly. ECF No. 155 at 31–32. The cases DHS cites directly contradict its argument, as they make clear the only deference appropriately afforded to the agency in this context is based on the agency's fact-finding function in individual cases. *See id.* at 32–33; *see also United States ex rel. Freeman v. Williams*, 175 F.274, 275 (S.D.N.Y. 1910) (deferring to the agency's factual findings regarding whether an individual was a public charge, but exercising the court's authority to "construe the act"); *Ex parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) (deferring to agency's factual findings, but reversing based on court's construction of the public charge doctrine).

Finally, DHS's fundamental premise—that the Rule is intended to promote Congress's stated goal of "self-sufficiency"—is without merit. First, DHS has no

basis for attempting to construe 8 U.S.C. § 1601, since Congress did not delegate it authority to interpret a statute designed to address U.S. social welfare policy. *See E.E.O.C. v Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). Second, DHS has no expertise in welfare reform and whether public benefits programs lead to self-sufficiency, and the Rule contradicts its earlier position, so its interpretation is not entitled to even minimal deference. *Id.* Third, DHS may not use a statement of policy in a different statute to interpret the Immigration and Nationality Act (INA), because that "would virtually free [DHS] from its congressional tether." *Comcast Corp. v. FCC*, 300 F.3d 642, 655 (D.C. Cir. 2010); *see also id.* at 654 ("Policy statements are just that—statements of policy. They are not delegations of regulatory authority"). Lastly, even section 1601 clearly sets forth Congress's judgment that offering certain limited, non-cash, supplemental benefits to qualifying immigrants constitutes "the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7).

2. Precedent does not support the Rule's expansive definition of public charge

DHS misstates and omits widespread judicial authority showing the term "public charge" has been understood for over a century to refer to individuals who are primarily dependent on the government for survival. *See, e.g.*, *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915); *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (public charge category only "exclude[s] persons who were

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likely to become occupants of almshouses"); *Ex parte Mitchell*, 256 F. at 233 (interpreting "public charge" as "generically similar to 'paupers,' . . . 'professional beggars,' [and] . . . 'occupants of almshouses' "); *United States v. Williams*, 175 F. 274, 275 (S.D.N.Y. 1910) (L. Hand, J.) (noting that "the primary meaning of the words, ['likely to become a public charge']" was probably "likelihood of . . . becoming a pauper").[4]

DHS's counter-arguments are unavailing. For example, DHS claims Congress amended the public charge grounds for exclusion in 1917 in response to a Supreme Court decision holding the phrase should be read in parallel with its surrounding terms, such as "paupers and professional beggars." *See* ECF No. 155 at 21–22. According to DHS, this shows Congress's intent that "public charge" refers to more than just paupers. DHS overstates the import of the 1917 amendment, however, by failing to recognize that courts—including the Ninth Circuit—afterward declined to apply any modified definition to the term. *See Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) ("Although in the act

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[4] DHS misleadingly uses dictionary definitions of "charge" as a financial term (*e.g.*, a "burden, incumbrance, or lien") to muddy the plain meaning of "public charge" as a legal category of persons. ECF No. 155 at 19. Even DHS's own definitions, however, reveal the original meaning of public charge, when referring to a person, was closely related to a "pauper . . . chargeable to the parish or town." *Id.* (quoting Stewart Rapalje et al., Dict. of Am. & English Law (1888)).

of February 5, 1917 . . . the location of the words 'persons likely to become a public charge' is changed . . . this change of location of the words does not change the meaning that should be given them . . ."); *Ex parte Mitchell*, 256 F. at 232 (explaining the court is "unable to see that this change of location of these words in the act changes the meaning that is to be given them").

Further, the cases on which DHS relies do not support the agency's unprecedented expansion of the doctrine. *See* ECF No. 155 at 22 (citing *Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (affirming public charge finding where immigrant was imprisoned and thus "committed to the custody of a department of the government")); *In re Feinkopf*, 47 F. 447, 447–48 (E.D.N.Y. 1891) (holding that immigration inspector wrongly determined person a public charge without a scintilla of evidence); *United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) (public charge finding due to immigrant's "poverty and inefficiency" and "earning more or less as a peddler" living in "extreme poverty," not earning a modest living but needing assistance).

Instead, the widespread understanding among courts that the public charge doctrine requires primary dependence on the government for subsistence has continued from colonial times through the present day. ECF No. 34 at 24–26 (discussing colonial and early state cases). Indeed, when amendments were introduced in 1996 to expand the doctrine in the fashion DHS now seeks to enact, it was with the express intent of overturning the settled understanding in case law.

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Yet these amendments were rejected. *Id.* at 30. Thus, just as with evidence of Congressional intent, judicial decisions interpreting the term undermine DHS's attempt to enact its unlawful policy changes through rulemaking.

3. DHS's definition is directly at odds with agency precedent

In addition to contravening Congressional and judicial precedent, the Rule is irreconcilable with the agency's own pronouncements and interpretations of the public charge doctrine, which provide context for determining the meaning of the term. ECF No. 34 at 30–34. Specifically, DHS falsely characterizes its 1999 Field Guidance as "novel and anomalous." *See* ECF No. 155 at 25–27. It is incorrect that the 1999 Field Guidance marked the "introduction" of the common understanding of public charge as involving primary dependence on public assistance, as evidenced by the long line of precedent demonstrating the term's established meaning. *See* cases cited *supra* at 11–12.

Tellingly, the agency's predecessor regulations are consistent with the 1999 Field Guidance. After Congress passed the Immigration Control and Reform Act of 1986, INS promulgated regulations making clear that the public charge analysis would not take into account in-kind assistance. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205 (May 1, 1987) (public charge analysis would not extend to the receipt of "assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid,

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emergency treatment . . .")). When INS issued the 1999 Field Guidance, it confirmed what had already been made plain—that it had "never been [INS] policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge." 64 Fed. Reg. 28,689, 28,692 (Mar. 26, 1999) (explaining that "non-cash benefits . . . are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or a family" and are "not evidence of poverty or dependence").

The sources DHS identifies do not support its position that the 1999 Field Guidance introduced a novel standard. It mischaracterizes a brief excerpt from *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (A.G. 1962). *See id.* ("the [INA] requires more than a showing of a possibility that the alien will require public support"); *see generally* ECF No. 35-3 at 59 (*Make the Road New York* Compl., Bays Decl., Ex. DDD) ¶ 70. To dispute the State Department's own data showing negligible exclusions based on public charge (*see* ECF No. 34 at 5 n.5), DHS also cites a report by a panel appointed by President Herbert Hoover in 1929, the main purpose of which was to address organized crime and resolve the debate over continuing Prohibition. *See* https://law.jrank.org/pages/11309/Wickersham-Commission.html (last visited Sept. 26, 2019); ECF No. 155 at 27. DHS's own data, however, show that between 1892 and 1980 less than one percent of immigrants were deemed inadmissible as likely to become public

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charges. *See* Dep't of Homeland Security, Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016, (Dec. 18, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2016/table1 (last visited Sept. 27, 2019); Immigration and Naturalization Service, 2001 Statistical Yearbook of the Immigration and Naturalization Service 258 (2003), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2001.pdf (last visited Sept. 27, 2019); ECF No. 35-3 at 57, ¶ 65.

As evidenced by over a century of public charge enforcement and legislation, what is novel and anomalous is *not* the 1999 Field Guidance but the Rule itself. *Compare* 64 Fed. Reg. at 28,692 (noting that as a result of the 1999 Field Guidance, INS did "not expect to substantially change the number of aliens who will be found deportable or inadmissible as public charges") *with* ECF No. 35-1 at 489 of 661 (Ex. T) (reporting results of study showing that a staggering "40 percent of U.S.-born individuals . . . [had] participated in one of the five [proposed public charge benefits] programs over the 1998-2014 period") *and* ECF No. 35-1 at 366 of 661 (Ex. S) ("When recent green card recipients are compared to the new criteria, over two-thirds would have at least one negative factor and more than 40% had two or more.").

4. The Rule violates Section 504 of the Rehabilitation Act by discriminating against individuals with disabilities

The Rule is also unlawful because it violates Section 504's prohibition against disability-based discrimination. *See* 29 U.S.C. § 705. In contravention of

Section 504, DHS concedes that (1) an individual's disability will be expressly considered in the public charge analysis, and (2) such consideration might have a "potentially outsized impact" on individuals with disabilities. 84 Fed. Reg. at 41,368. DHS argues these disparate and discriminatory effects are justified, however, by Congress's direction in the INA that the relevant public charge factors include an individual's "health." ECF No. 155 at 50. Without offering any citation to governing authority, DHS theorizes that by including "health" as a factor, the statute "certainly includes an alien's disability." *Id.* Thus, according to DHS, the INA takes precedence over Section 504 because "[a] specific, later statutory command, such as that contained in the INA, supersedes section 504's general proscription to the extent the two are in conflict." *Id.* at 61.

The reality is actually the inverse. As between the two statutes, Section 504's narrow prohibition against disability-based discrimination is far more specific and targeted than the INA's generalized direction to consider "health" as a factor in the public charge analysis. For example, Section 504 contains express definitions for what constitutes a disability, *see* 29 U.S.C. § 705(20)(A); what does *not* constitute a disability, *see* 29 U.S.C. § 705(20)(D), (F)(i-iii); and what constitutes a "significant disability," *see* 29 U.S.C. § 705(21)(A)(i-iii). By contrast, even DHS concedes that in the context of the INA, Congress "le[ft] the meaning of 'health' undefined." *See* ECF No. 155 at 36 n.11; *see also id.* at 36.

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For the proposition that DHS should be able to consider disabilities in making public charge determinations, it relies on a case addressing a rule that was upheld in large part because it did *not* consider disabilities. *See* ECF No. 155 at 51–52. In *Sandison v. Michigan High School Athletic Association*, the Sixth Circuit overturned the preliminary injunction of a statute barring 19-year-olds from playing high school sports. 64 F.3d 1026, 1030 (6th Cir. 1995) (reasoning that although the statute had the effect of disadvantaging students with learning disabilities, it did not violate Section 504, in large part because it focused solely on the students' ages and did not consider their disabilities in the analysis).

Here, in contrast to *Sandison*, DHS not only seeks to consider an individual's disability in the public charge analysis, but even intends to double- and triple-count factors frequently related to and overlapping with disabilities, such as an individual's use of Medicaid or lack of private insurance. *See* ECF No. 35-1 at 222 of 661 (Ex. L) (Comment by ACLU) ("In our nation's complex system of disability and health care, receipt of Medicaid is inseparable from the status of being disabled."). Thus, despite DHS's head-in-the-sand argument that an individual's disability will be just one factor "among many," *see* ECF No. 155 at 51, the Rule ensures individuals with disabilities will suffer a cascade of negative and heavily-weighted negative factors, all because of their disability. The Rule discriminates against persons with disabilities and violates the Rehabilitation Act.

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C. The Rule Is Arbitrary and Capricious

DHS's response makes clear it lacks any reasonable justification for the dramatic harms the Rule will inflict on vulnerable populations, as well as the unfettered discretion its arbitrary and unreliable factors will afford to immigration officials enforcing the Rule. An agency's action will be deemed arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983). Here, DHS has failed to address significant parts of the problem and has not offered reasoned explanations to justify the choices it made based on the facts it found. *Id.* Further, where an agency departs from prior policy that has engendered serious reliance interests, it must provide an even more "detailed justification" for its actions. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). DHS's response falls far short of the mark.

1. DHS has failed to justify the Rule's potentially devastating effect on public health

Despite being presented with overwhelming evidence the Rule would lead to severe public health crises, including reduced vaccinations and the increased spread of communicable diseases such as tuberculosis, DHS largely shrugged off these concerns and proceeded to finalize the Rule. For example, instead of attempting to substantively address the potential harms to public health, DHS

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contends it cannot "measure the immeasurable" or "respond to every single example cited in every single comment." *See* ECF No. 155 at 39–40. The issue is not, however, the lack of precise measurement, but that, given the dire public health risks, DHS is required to demonstrate a reasonable attempt to grasp the magnitude of the problem along with a cogent justification of the harms. *See State Farm*, 463 U.S. at 43; *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (the "mere fact" that a rule's effect is "*uncertain* is no justification for *disregarding* the effect entirely" (emphasis in original)). DHS essentially concedes it has done neither, instead falling back on its token refrain that the goal of self-sufficiency justifies whatever unknown harms the Rule might inflict. *See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (explaining that courts will not defer to [an] agency's conclusory or unsupported suppositions").

DHS also responds that it exempted children and pregnant women's receipt of Medicaid benefits from the analysis, which it contends "should eliminate much of the concern that children will forgo vaccinations as a result of the Rule." ECF No. 155 at 39. This response, however, fails to address many of the public health crises warned about in the comments, *see* ECF No. 34 at 42–43, and it does nothing to remedy the concern that *adults* who do not obtain vaccinations may give rise to an outbreak. Without adequate supporting information, evidence, or context, DHS speculates there might be sufficient state

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or local government providers that will administer affordable vaccinations absent Medicaid coverage. ECF No. 155 at 39–40. But given the overwhelming evidence of public health consequences that are likely to result from implementation of the Rule—and are in fact *already* resulting from it, *see, e.g.*, ECF No. 35-1 at 97–107 of 661 (Ex. F) (describing disenrollment resulting from chilling effect of the proposed rule); ECF No. 60 (Batayola Decl.) at 9–10 (describing patients and clients who have already requested disenrollment from benefits programs)—DHS's lack of any reasonable effort to consider the magnitude of the problem is facially deficient.

2. DHS has failed to justify severe and irreparable harm to children

DHS also has failed to offer any meaningful justification in response to overwhelming evidence showing the Rule will have devastating effects for children who benefit from food and housing assistance. As commenters explained, the Rule will lead to increased childhood hunger, malnutrition, and homelessness, which are associated with a litany of related effects and lifelong traumas, including depression, poor performance in school, mental illness, substance abuse disorder, and chronic health conditions such as asthma. *See, e.g.*, ECF No. 35-1 at 607–12 of 661 (Ex. V) (Comment by Childhood Asthma Leadership Coalition).

DHS argues that any potential harms the Rule might inflict on such children are justified by the need to promote the purported goal of "self-

sufficiency." ECF No. 155 at 41–42. There is no logical basis, however, for penalizing a young child for her receipt of food or housing assistance in the hopes that doing so will prompt her to someday become "self-sufficient." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating agency action that failed "to consider or to adequately analyze [the] consequences" of agency decision).

DHS similarly fails to offer a coherent justification for its decision to exempt children's Medicaid benefits from the public charge analysis but count their receipt of SNAP or housing assistance against them. Instead, DHS largely relies on irrelevant facts that have nothing to do with the problem. ECF No. 155 at 42–43 (arguing that the distinction is justified in part because unlike Medicaid, SNAP contains only a limited waiver of the waiting period). DHS's reasoning reflects the arbitrariness of a Rule that would promote so absurd a goal as childhood "self-sufficiency" at so great a cost.

3. DHS has failed to justify harms to individuals with disabilities

In response to evidence that the Rule will be devastating for individuals living with disabilities, DHS contends that "[o]nly if an alien, disabled or not, is likely to use one or more covered federal benefits for the specific period of time will that individual be found inadmissible as a public charge." ECF No. 155 at 50–52. In other words, presented with overwhelming evidence that individuals with disabilities rely on Medicaid for services that are not covered by private

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insurance and which allow them to work and be self-sufficient, DHS crafted a Rule aimed at "self-sufficiency" but accomplished the inverse. *See State Farm*, 463 U.S. at 43. The most the agency does is acknowledge the Rule might have a "potentially outsized impact" on such individuals. 84 Fed. Reg. at 41,368. For the reasons set forth above, this is deficient. *See supra* at 17–19 (arguing the Rule violates Section 504 of the Rehabilitation Act).

4. DHS relies on vague, arbitrary factors that prevent meaningful or even-handed enforcement of the Rule

DHS attempts to justify its consideration of factors such as English proficiency and credit scores even despite evidence showing the factors are vague, unreliable, and have no reasonable relation to the Rule's purported goal. *Compare, e.g.*, ECF No. 35-1 at 655–57 of 661 (Ex. Y) (Comment from Consumer Reports) ("Credit scores are designed to measure the likelihood that a borrower will become 90 days late on a credit obligation [and] do not contain information about an individual's earnings or other income.") *and id.* at 659–61 of 661 (Ex. Z) (Comment from Credit Builders Alliance) (noting that credit scores are "a poor indicator of one's ability to provide for themselves and their family" and that "25 percent of credit reports have 'potentially material errors' that could affect a consumer's score") *with* ECF No. 155 at 49–50 (arguing that, "notwithstanding occasional flaws, credit reports are probative of an individual's financial condition, as evidenced by their widespread use throughout the American economy"). Similarly, the Rule's use of vague and undefined

benchmarks such as "English proficiency" demonstrates the Rule is arbitrary and capricious. *See Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229 (9th Cir. 2001) (holding rule was arbitrary and capricious because the question of "whether there has been compliance with [its] vague directive [was] within the unfettered discretion of the [agency], leaving no method by which the applicant . . . can gauge their performance").

In response, DHS argues that factors such as "English proficiency" are not vague, as DHS has "specif[ied] this and other factors to be considered," "explain[ed] which factors are to be afforded greater weight," and "specifically explained how it will implement" the Rule. *See* ECF No. 155 at 48. But this argument is conclusory and fails to address the issue. Moreover, DHS ignored that by incorporating such vague and undefined factors into the public charge analysis, the Rule gives immigration officers unfettered discretion when conducting public charge assessments, making each applicant's assessment a "sport of chance" that "the APA's 'arbitrary and capricious' standard is designed to thwart." *Judulang v. Holder*, 565 U.S. 42, 58–59 (2011).

D. The Plaintiff States Will Suffer Irreparable Harm Absent a Stay or Injunction

Through 51 declarations from state officials who administer Medicaid and other public health programs, food and cash assistance programs, and housing programs, along with non-profit organizations on the front lines helping immigrants to thrive, the Plaintiff States have made a powerful showing of the

irreparable injury that the Rule will cause. These harms are certain to occur, and, in fact are already occurring, even though the Rule has not yet gone into effect. *See* ECF No. 60 (Batayola Decl.) at 9–10 (patients and clients have already requested disenrollment from programs such as the Special Supplemental Nutrition Program for Women, Infants, and Children, even where benefits are not actually enumerated in Rule); ECF No. 152 (Br. of Amici Curiae Am. Academy of Pediatrics) at 13 (explaining significant 2018 disenrollment rates upon announcement of the proposed rule, and stating this demonstrated "chilling effect is real, measurable, and exacerbated by the final Regulation.").

Immigrants have already withdrawn from federal and state programs, thereby endangering their health and wellbeing and frustrating the missions of the state programs meant to ensure healthy communities. *See, e.g.*, ECF No. 35-1 at 97–107 of 661 (Ex. F) (describing chilling effect of the proposed rule); *see also* 1999 Field Guidance, 64 Fed. Reg. at 28,692 (explaining INS's conclusion that "reluctance to access benefits" on the part of "eligible aliens and their families, including [their] U.S. citizen children," "has an adverse impact not just on the potential recipients, but on public health and the general welfare"). This *predictable* reaction in turn imposes *predictable* and specific costs on the Plaintiff States. *See supra* at 2–5.

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The greatest defect in DHS's argument is its confusion of *whether* these harms will occur with the *extent* of the harm that will occur.[5] But there can be no dispute that harm will occur. Indeed, DHS concedes disenrollment will occur, 84 Fed. Reg. at 41,463, medical care will shift to the emergency room, 84 Fed. Reg. at 41,384, and the prevalence of disease will increase, 84 Fed. Reg. at 41,384 and 51,270. It is well-established that if the Plaintiff States are able to prove that these harms are fairly traceable to the defendants, as they have amply done, the magnitude of the harm is irrelevant to the Court's analysis. *See Simula, Inc.*, 175 F.3d at 725 (preliminary injunction may be granted "irrespective of the magnitude of the injury").

Furthermore, the declarations submitted by the States provide more than the requisite amount of certainty, imminence, and irreparability regarding the Rule's resulting harms. For example, the public health injuries to residents are obvious and are described through numerous declarations. *See, e.g.*, ECF No. 71 (Oliver Decl.) at 11 (". . . People will die."); ECF No. 37 (Linke Decl.) at 11 ("Families will not seek preventative care services. . ."); ECF No. 38 (Sharfstein Decl.) at 5

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[5] It is notable that at the same time DHS criticizes the Plaintiff States for not providing exact measurements of the precise harms the Rule will inflict, it excuses its own *de minimus* response to the over 266,000 comments largely in opposition to the Rule, asserting it could not "obtain the unobtainable" or "measure the immeasurable." ECF No. 155 at 50.

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("[F]amilies will not sign up for the Medicaid program, even for their children who are entitled to care. . . [and] the result will be unnecessary illness").[6]

The Plaintiff States have made the same overwhelming showing of harm to their missions, *see, e.g.*, ECF No. 37 (Linke Decl.) at 14 (The Rule would "unwind[] all the progress that has been achieved to ensure that all Washingtonians have access to affordable care."); ECF No. 43 (MacEwan Decl.) at 7 (describing how the reduction of "lawfully present enrollees will result in a sicker risk pool and increase premium costs for all remaining residents enrolled in commercial insurance coverage through Washington Healthplanfinder"), and harm to their fiscs, *see, e.g.*, ECF No. 66 (Peterson Decl.) at 19 (explaining that changes to food and cash assistance programs alone would result in a reduction of up to $97.5 million annually in total economic output in Washington).

While DHS portrays the issue as one of speculative harm to individuals, the Court should instead find that immigrants, when confronted with the threat of

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[6] The submissions by amici curiae likewise paint a vivid picture of the harms to vulnerable groups. *See, e.g.*, ECF No. 110 (Br. of Amici Curiae ACLU) (harms to disabled individuals); ECF No. 111 (Br. of Amici Curiae Nonprofit Anti-Domestic Violence & Sexual Assault Organizations) (harms to domestic violence victims); ECF Nos. 149 (Amici Curiae Br. of AHA), 152 (Br. of Amici Curiae Am. Academy of Pediatrics) (harms to children and pregnant women); ECF No. 150 (Br. of Amici Curiae Justice in Aging) (harms to elderly).

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deportation, will react predictably in forgoing benefits to which they are otherwise legally entitled. ECF No. 153 (Br. of Amici Curiae Fiscal Policy Inst.) at 10–11 (projecting economic losses of up to $24 billion for the United States as a whole). Accordingly, the Plaintiff States have met their burden of establishing irreparable injury.

In a last ditch effort to show the remaining equitable interests weigh in its favor, DHS asserts "there can be no doubt that Defendants have a substantial interest in administering the national immigration system, a *solely federal* prerogative." ECF No. 155 at 57. But a stay would not prevent DHS from "administering the national immigration system"—it would only require DHS to maintain the status quo. DHS's argument also presumes its rulemaking was lawful. If DHS were correct that such a vague assertion were sufficient to balance the equities in its favor, the analysis would be rendered meaningless, as the government could always allege an overriding interest in enforcing its own decisions. Here, the balance of equities weighs heavily in the Plaintiff States' favor. *See* ECF No. 34 at 55–56; *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778–79 (9th Cir. 2018) (affirming grant of TRO in immigration case and explaining the stay did not harm the government but instead "temporarily restored the law to what it had been for many years prior").

E. Nationwide Relief Is Necessary to Afford Complete Relief

Nationwide relief, whether in the form of a stay pursuant to APA § 705 or

a preliminary injunction, is appropriate in this case. "The scope of an injunction is 'dependent as much on the equities of a given case as the substance of the legal issues it presents,' and courts must tailor the scope 'to meet the exigencies of the particular case.'" *Azar*, 911 F.3d at 584 (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). Here, a stay or injunction applied to only the fourteen Plaintiff States would not afford complete relief, and, to the contrary, would compound the harms on the state fiscs.

The Court should not credit DHS's about-face on the necessity of "uniformity in immigration policy." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018). DHS's assertion that any relief should be limited to the Plaintiff States is undermined by its consistent previous arguments in other immigration cases advocating a uniform nationwide immigration system. *See, e.g.*, Br. for Appellant at 30, *United States of America v. State of California*, 2018 WL 4641711 (9th Cir., filed Sept. 18, 2018) (No. 18-16196) (arguing for release of information regarding federal immigration detainees under a uniform federal scheme rather than the varying laws of fifty states); Br. for the United States at 24, *Arizona v. United States of America*, 2012 WL 939048 (U.S., filed Mar. 19, 2012) ("scheme that depends on national uniformity cannot coexist with a patchwork of different state regimes").

Furthermore, beyond the need to avoid a disjointed and unworkable nationwide immigration system, nationwide relief is necessary to afford the

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Plaintiff States effective relief. *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987). Here, the harm alleged by the Plaintiff States is not only financial. *See Azar*, 911 F.3d at 584 (holding that a nationwide injunction was not proper where a localized injunction would sufficiently remedy the alleged financial harm). The disenrollment and resulting harms to health caused by the Rule's chilling effect can only be sufficiently addressed with a nationwide remedy.

This is true, first, because any immigrant residing in one of the Plaintiff States who may in the future wish to move to another state not among them would be deterred from accessing public benefits if relief were limited in geographic scope. Second, a geographically limited injunction could spur immigrants now living elsewhere to move to one of the Plaintiff States, compounding their economic injuries. Third, a public health crisis or outbreak resulting from the Rule's implementation in another state may quickly spread to the Plaintiff States. Fourth, and finally, if the injunction applied only in the fourteen Plaintiff States, a lawful permanent resident returning to the United States from a trip abroad of more than 180 days would be subject to DHS's new Rule at a point of entry. Therefore, the scope of the injunction must be universal to afford the Plaintiff States the meaningful and effective relief to which they are entitled.

II. CONCLUSION

For the foregoing reasons, the Plaintiff States' motion for § 705 relief pending judicial review or for preliminary injunction should be granted.

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RESPECTFULLY SUBMITTED this 27th day of September, 2019.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 27th day of September, 2019, at Seattle, Washington.

/s/ Jeffrey T. Sprung
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